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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78- 191

GEORGE E. FASSNACHT,

Petitioner

v.

PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

George E. Fassnacht respectfully petitions for a Writ of Certiorari to review the judgment of the Superior Court of Pennsylvania in the above-captioned case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania (Appendix 1-17) is reported at 369 A.2d 800. The order of the Superior Court denying rehearing (A. 19), and the orders of the Supreme Court of Pennsylvania denying allowance of appeal and denying reconsideration of allowance of appeal (A. 20) are not reported. The opinion of the Court of Common Pleas (A. 21-34) is not reported.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered February 18, 1977. A timely Petition for Reargument was denied on March 8, 1977. A timely Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on August 5, 1977. A timely Application for Reconsideration of Denial of Allowance of

Appeal was denied on April 4, 1978. By order dated June 21, 1978, Mr. Justice Brennan extended to August 2, 1978, the time for filing a Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

ISSUES PRESENTED

Did the judgment below, forfeiting property seized during a search, violate Petitioner's Fourth Amendment rights, as applicable under the Fourteenth Amendment, when (1) the property now at issue consisted of rifles, pistols and ammunition, all innocent in themselves if possessed as a weapons collection in Petitioner's home, (2) the forfeiture was ordered notwithstanding recognition by the Pennsylvania court that the prior decision suppressing the evidence required that all property except contraband per

se must be returned to Petitioner, and (3) the Pennsylvania court concluded that Petitioner's rifles, pistols and ammunition, were "contraband per se" because evidence obtained during the search, including the "nature, quality and manner of storage" of the items in Petitioner's basement, "indicated" that Petitioner was an unlicensed dealer within the meaning of the Gun Control Act of 1968, 18 U.S.C. §§ 921 et seq.?

Did the judgment below violate Petitioner's Fourteenth Amendment rights under the due process clause by determining (1) that Petitioner was an unlicensed dealer, without any evidence whatsoever to establish that Petitioner had done any act alleged to constitute dealing, even if all the evidence previously suppressed were considered, and (2) by establishing a presumption that mere possession of a quantity of property

is evidence of an intention to act as a dealer in respect of that property, notwithstanding Petitioner's uncontradicted denials of any transactions as a dealer?

Did the judgment below misconstrue the Gun Control Act of 1968 by adopting a definition of "unlicensed dealer" so broad as to reach many persons who possess quantities of weapons in their homes, contrary to the intent of Congress that gun collecting not be proscribed by the Act?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Gun Control Act of 1968, Public Law 60-618, § 102 82 Stat. 1214, 18 U.S.C.:

§ 921. Definitions

(a) As used in this chapter -

* * * *

(11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

* * * *

§ 922. Unlawful acts

(a) It shall be unlawful -

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

STATEMENT OF THE CASE

Petitioner George E. Fassnacht ("Petitioner") is a forensic ballistics expert and a collector of firearms. From 1962 through early 1967, he was a ballistics expert and firearms examiner with the City of Philadelphia Police Department, resigning his position in 1967 to accept employment with the federal Government as a firearms and ordnance expert. In 1968, Petitioner received a "permanent change of station" assignment to a location outside the United States and was entitled under applicable regulations to have his personal property packed and stored at Government expense. Petitioner arranged for Government packaging of his collection of firearms, but shortly before leaving the country in July 1968, Petitioner married and his wife moved into his family home in Philadelphia. Petitioner's firearms collection, still contained in the

Government-supplied packaging, was stored in the basement of the home, rather than being placed in storage at Government expense.

From 1951 through the time of Petitioner's departure overseas in July 1968, Petitioner held a federal license under the Federal Firearms Act of 1938, § 3, 52 Stat. 1251, to facilitate his activities as an expert and collector. During Petitioner's absence from the United States, the Gun Control Act of 1968, Public Law 90-631, 82 Stat. 1214, 18 U.S.C. §§ 921 et seq., was enacted, redefining the qualifications for federal licenses and requiring promulgation of regulations to implement the revised licensing procedures. In December 1968, Petitioner returned briefly to the United States on leave and orally discussed renewal of his license with an officer of the U.S. Treasury Department. Petitioner

was informed that under new criteria pursuant to the 1968 Act and as a non-resident, Petitioner was not eligible for renewal of his license. During the same month, Petitioner applied to the Treasury Department for registration of automatic weapons in his collection, pursuant to the statutory amnesty provisions of Section 207 of the 1968 Act, notwithstanding that the amnesty period had closed November 31, 1968, since he had been outside the United States during the entire thirty-day amnesty period. His eligibility for registration was determined in Petitioner's favor at the Washington office of the Alcohol, Tobacco and Firearms Division, with registration to be completed upon his return to the United States.

Petitioner next returned to the United States on June 24, 1971. Four days earlier, on June 20, City of Phila-

delphia police officers appeared at Petitioner's home and demanded of Petitioner's wife that they be admitted and allowed to search Petitioner's basement. Petitioner's wife declined to admit the police officers unless they obtained a search warrant. Notwithstanding her denial of consent, a large number of Philadelphia police, later joined by Treasury Department officers, searched the basement and removed Petitioner's entire firearms and ammunition collection. Petitioner was charged with three state criminal offenses triable in the Philadelphia Municipal Court. One charge, a felony, alleged possession of machine guns in violation of former 18 Pa. Stat. § 4629, repealed by 1972 P.L. 1482. The second charge alleged a violation of an 1856 statute regulating storage of gunpowder inside Philadelphia, 53 Pa. Stat. § 16570, 1856 P.L. 137, for which the

penalty is a fine of $500 "to be recovered . . . in an action of debt . . . to and for the use of the Philadelphia association for the relief of disabled firemen." The third charge was a summary offense punishable by a maximum fine of $100 for alleged violation of an explosives storage statute, 73 Pa. Stat. §§ 151-68, 1937 P.L. 2681.

Petitioner was tried in the Municipal Court. The prosecution presented its entire case, both in opposition to Petitioner's motion to suppress and on the merits. Petitioner presented evidence in support of his motion to suppress. The Municipal Court Judge determined that neither of the justifications for the warrantless search and seizure had been established, i.e., (1) Petitioner's wife had not consented to the search, and (2) no "emergency" justifying a warrantless seizure existed as

the result of the delivery to the basement, on the day of the search, of a quantity of black powder, the property of Petitioner which he had stored outside Philadelphia prior to his departure, and explosives belonging to another individual, both of which had been placed in the basement that day without Petitioner's knowledge or approval. The Municipal Court accordingly granted a motion to suppress all evidence resulting from the search of Petitioner's home and a related search at a different location on the ground that the search was in violation of the Fourth Amendment and the corresponding provision of the Pennsylvania Constitution, Article I, § 8. On appeal to the Court of Common Pleas, the order of suppression was affirmed as to evidence resulting from the search of Petitioner's home, but reversed as to evidence from a search at another location. Opinion, A.35.

Following remand of the case to the Municipal Court, Petitioner was acquitted.

Petitioner sought the return of his firearms collection. The prosecutor, an Assistant District Attorney who had personally participated in the warrantless search, initially stated in writing to Petitioner's counsel that the Commonwealth had "no objections to returning all the weapons taken from the Fassnacht residence with the exception of any that might be classified as contraband. It is my recollection that there were one or two automatic weapons in that lot; . . . . I gather that you are not requesting the return of the automatic weapons [seized at another location]. You are not asking for explosives." Subsequently, the prosecutor conditioned his return of the material confiscated (again excepting some "contraband" items such as automatic weapons), upon Petitioner's

agreement "that there will be no further action" by Petitioner.

Petitioner declined to agree to a general release of his damage claims arising from the search and accordingly was required to file a petition in an effort to obtain his property. The prosecutor opposed the petition initially on two grounds only, i.e., (1) Petitioner had not proved that the weapons seized "are in fact Petitioner's property" and (2) Petitioner had not proved that "the property, it if [sic] does belong to him, may be legally processed [sic] by him."

The Miscellaneous Judge of the Court of Common Pleas, who had not heard any of the earlier proceedings in the case, declined to have a formal hearing on the petition. There instead occurred a conference in chambers attended only by counsel, Petitioner himself being excluded, during which conference the pro-

secutor made offers of proof of the testimony to be offered in opposition to the petition. Petitioner's counsel objected to all evidence except evidence concerning the current status as contraband per se of any of the weapons. Transcript [of Conference] ("Tr.") at 3-5. The prosecutor contended that automatic weapons which had been seized were "contraband per se" (Tr. 26-27). The prosecutor stated that "there are a large number of regular rifles which are not automatic pistols or adaptable [as automatic weapons]"; such "regular pistols," although not registered, were "in the basement," and hence did not require registration (Tr. 27); none of these rifles or regular pistols were contended by the prosecutor to be contraband per se. The prosecutor also conceded that small arms ammunition "can be owned by anyone. It does not have to be licensed" (Tr. 16).

As to the rifles, pistols, and small arms ammunition, constituting the bulk of the property seized, the prosecutor urged that the property should be confiscated on the theory that "Mr. Fassnacht was a dealer, an unlicensed dealer; that he stored these items in his basement without proper license, and therefore they are forfeitable" (Tr. 16).

The prosecutor's offer of proof to establish that Petitioner was a "dealer, an unlicensed dealer" included photographs of Petitioner's basement which had been made during the search. The same photographs had been earlier marked for identification in Petitioner's trial and were among the evidence which had been suppressed. The prosecutor also offered the testimony of a Treasury Department officer, Frank A. Moyer, concerning Moyer's observation of the basement and the property seized in the

basement, and not on any knowledge of Petitioner's actual conduct. Moyer had testified previously and his testimony was among the evidence suppressed. The prosecutor offered Moyer's opinion that the quantity of weapons and ammunition was "indicative to him of a dealer in firearms and ammunition and not a collector" (Tr. 39) and Moyer's opinion "that the storage of the weapons, although neat and clean was also indicative of a dealer rather than a collector since a collector would not keep them in boxes down in the basement" (Tr. 39); "the manner of storage of the weapons themselves were not indicative of a collector. Moyer would indicate that they were all well kept, clean, oiled, et cetera, was that a collector would not reuse this quantity of items in the basement in boxes for a period of several years" (Tr. 33) (emphasis added).

Petitioner's counsel, after repeatedly objecting to admission of these offers (Tr. 4-5, 8-9, 14, 20, 40-41) agreed that Moyer would so testify (Tr. 44) and offered in rebuttal to produce Petitioner's testimony concerning his occupation as a ballistics expert, that "it is necessary in his role as a private ballistics expert to have on hand a collection," that Petitioner was also a private collector, and that Petitioner would testify that "he never engaged in transactions, wholesale or retail, with these items" (Tr. 46). Both sides agreed that Petitioner had attempted to register those automatic weapons which were required to be registered under the 1968 Act (Tr. 34-37, 47-48). It was stipulated that Petitioner was not then licensed

under the Act (Tr. 12, as of July 1974)* and stipulated also that Petitioner's license under the prior Federal statute had expired in 1969, after he left the United States (Tr. 12-13).

The prosecutor's contention that Petitioner had been an "unlicensed dealer" related to a time period in which Petitioner was outside the United States and far removed from the rifles, pistols and ammunition contended to be his stock in trade (Tr. 12-13).

Petitioner's counsel offered to present testimony of another ballistics expert to "rebut the

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* At the time of the subsequent argument in the Pennsylvania Superior Court, and presently, Petitioner holds a federal firearms license pursuant to U.S. Treasury Department ATF Ruling 73-19, 1973 Alcohol, Tobacco & Firearms Cum. Bull. 93 which provides that experts and consultants be licensed under the Gun Control Act of 1968 in category one, which is also the category for a "dealer in firearms."

[prosecutor's] inference concerning the dealership," including that expert's opinion that the quantity of items was "consistent with a private collection from his opinion and his experience" (Tr. 48).

The Miscellaneous Judge held that:

> "This Court agrees with the Commonwealth's averment that 'The nature, quantity and method of storage of the items that are contraband by statute and certain other items (the non-automatic rifles and pistols, ammunition, gun parts and magazines) establish that petitioner was an unlicensed dealer in firearms and ammunition, in violation of both Pennsylvania and federal laws covering both the licensing of the dealers and the storage of the items to be sold, and thus those items are contraband' and therefore not subject to be returned." Common Pleas Opinion A. 30.

On appeal to the Pennsylvania Superior Court, Petitioner again urged

the return of those items which were not subject to any statutory prohibition (principally rifles, pistols, and ammunition), and which accordingly could not be deemed to be contraband per se. Petitioner disclaimed seeking immediate possession of the automatic weapons, which had not yet been registered under the 1968 Act, pending disposition of a declaratory judgment action he had commenced in the United States District Court, Fassnacht v. Simon, Civil Action No. 74-2125 (E. D. Pa.), to require the U.S. Treasury Department to accept registration as of 1968 pursuant to the amnesty provisions of that Act.

Petitioner contended that the return of all property not contraband per se was required by this Court's decision in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)

(Brief for Appellant 4) that "the Fourth Amendment prohibits not only unreasonable searches but also unreasonable seizures" (Brief 6), and that "the forfeiture of the property in question constitutes an unlawful taking by the Commonwealth and a deprivation of property without due process" (Brief 4, 10).

Conceding that no statute prohibited possession in Petitioner's home of non-automatic rifles, pistols, and ammunition, the prosecutor argued in support of the Miscellaneous Judge's order of forfeiture of those items on the ground that everything seized during the search, "including the non-automatic pistols and rifles, ammunition, weapon parts, magazines and clips which appellant claims are returnable to him, are contraband since they represent the unsold inventory of [Petitioner's] unlicensed dealership

in arms, ammunition and explosives" (Brief for Appellee 19). The Prosecutor stated that "Admittedly, no direct evidence was presented to the Court below that [Petitioner] was involved in either retail or wholesale transactions with respect to the items that were seized from his home" (Brief 21), but contended that the circumstantial and opinion evidence sustained the finding that Petitioner was an unlicensed dealer. In addition to the opinions of Moyer, such as the opinion of Moyer that "the manner in which the weapons were stored in the basement was not the manner in which a collector would display his collection" (Brief 6), the prosecutor argued (without reference to any expert opinion) that some of the rifles appeared to the prosecutor on the

basis of the prosecutor's inventory to be duplicates of others owned by Petitioner, so that it appeared to the prosecutor that Petitioner "in several instances possessed more than one gun of the same model" (Brief 24), and that by analogy to cases involving persons discovered in possession of "massive quantities of heroin, glassine bags and other paraphernalia" the quantity nature and matter of storage of the items "found in [Petitioner's] basement indicates that Petitioner did not possess said items for his personal use, but rather possessed them for future transfer either by sale or other distribution" (Brief 22). (Emphasis added.)

The Superior Court heard oral argument and filed its decision twenty months later. The first part of the opinion accepts Petitioner's

contentions that the Fourth Amendment, as construed in Plymouth Sedan, 380 U.S. 693, required the return of all the property which was not contraband per se, holding that the "lower court's order that the property be forfeited and destroyed was proper only if the property was contraband per se, so that [Petitioner's] repossession of it would subject him to criminal penalties." Superior Court Opinion A. 7, 369 A. 2d at 803.

The second part of the Superior Court opinion considers separately three general descriptions of property. As to the items not prohibited by any statute (rifles, pistols, ammunition, and accessories), the Superior Court held that the lower court was "justified in finding by a preponderance of the evidence that [Petitioner] had engaged in unlicensed

dealing in violation of the Federal Gun Control Act" of 1968, 18 U.S.C. § 922(a)(1); the Superior Court explicitly did not reach or consider any other of the "string of statutes" referred to by the lower court. Opinion A. 11, 369 A.2d at 804. Apparently believing that the lower court had received testimony on the dealership issue, the Superior Court stated that Petitioner's contentions concerning his reference collection as a forensic ballistics expert had been "rebutted by the Commonwealth's expert testimony that the type of weapons and their duplication and manner of storage (export quality packaging) were not consistent with a 'reference collection' but rather indicated dealing." Opinion A. 12-13, 368 A.2d at 805.

As to the second broad category consisting of two types of gunpowder,

the Superior Court held one type to be contraband per se as an "explosive" within the meaning of a statute and a City ordinance. As to another type of gunpowder, conceded by the prosecutor to be "non-explosive," the Superior Court affirmed the lower court's holding that Petitioner's rights were controlled by the special and local three-month period of limitations on actions commenced "against the Philadelphia association for the relief of disabled firemen" to redress a wrongful seizure of gunpowder under the 1856 statute, 53 Pa. Stat. § 16568, rather than by the procedure under the modern Pennsylvania Rules of Criminal Procedure 324(b); Petitioner had earlier been charged with a criminal offense under that same 1856 statute, notwithstanding that the only procedure to penalize violations, as stated in the statute, is "an action

of debt . . . to and for the use of" the same association. Opinion A. 14-16, 369 A.2d at 805.

As to a third category of property, principally military swords, the Superior Court remanded for additional findings, noting that the statute relied on by the prosecution had not been enacted until after the seizure. Opinion A. 16-17, 369 A.2d at 805-06.

Petitioner applied successively for rehearing in the Superior Court, for review by the Supreme Court of Pennsylvania, and for reconsideration of that Court's denial of review, all of which applications were denied without opinion. The instant petition followed, seeking review both of the Superior Court's disposition of Petitioner's Constitutional claims and of the Superior Court's novel construction of "unlicensed dealing" within the

meaning of the Gun Control Act of 1968.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with this Court's construction of the Fourth Amendment in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), because the Pennsylvania Superior Court affirmed forfeiture of Petitioner's non-automatic rifles, pistols and ammunition, items innocent in themselves under both federal and state law, on the basis of evidence previously suppressed in the same proceeding and notwithstanding that the Superior Court recognized that the factual circumstances required return of all property not contraband per se.

The decision below is in conflict with the due process clause of the Fourteenth Amendment, as construed in Thompson v. Louisville, 362 U.S. 199 (1960), because Petitioner's

property was ordered forfeited without any evidence to establish the facts concerning the alleged "unlicensed dealership," even if the evidence obtained in violation of the Fourth Amendment is considered; the Superior Court's decision affirming the forfeiture has the effect of creating a presumption that mere possession of property is evidence of an intent to distribute that property, in conflict with this Court's decisions in Turner v. United States, 396 U.S. 398, 421 (1970), and Tot v. United States, 319 U.S. 463 (1943).

The decision below adopts a construction of a frequently litigated portion of the Gun Control Act of 1968, 82 Stat. 1214, 18 U.S.C. §§ 921 et seq., which is in conflict with the reasoning of all decisions of the Courts of Appeals on the quantum of

evidence necessary to establish that an individual is an unlicensed dealer, e.g., United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975) cert. denied, 424 U.S. 918 (1976); United States v. Gross, 451 F.2d 1355 (7th Cir. 1971), and is contrary to the Congressional intent that gun collecting is not proscribed by the Act. Huddleston v. United States, 415 U.S. 814, 828 n.9 (1974).

A. Petitioner's Fourth Amendment rights were violated by the forfeiture of property innocent in itself on the basis of evidence previously suppressed.

Since 1886, evidence obtained in violation of the Fourth Amendment may not be used in a federal proceeding to sustain a forfeiture. Boyd v. United States, 116 U.S. 616 (1886). That constitutional exclusionary rule has been applicable since 1965 to state forfeiture proceedings. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

Both the reasoning of this Court in Plymouth Sedan and the application in other cases of the exclusionary rule declared in Plymouth Sedan depend heavily on the distinction between contraband per se and derivative contraband.

Contraband per se constitutes "objects the possession of which, without more, constitutes a crime." 380 U.S. at 699, such as narcotics, United States v. Jeffers, 342 U.S. 48, 54 (1951) or an unregistered still. Trupiano v. United States, 334 U.S. 699, 710 (1948). The Fourth Amendment exclusionary rule of Plymouth Sedan does not apply to protect a claimant who seeks the return of contraband per se, because if the object subject to forfeiture is one of those "objects the possession of which, without more, constitutes a crime," the Government which has illegally seized the object is not required to return it, not only

because "repossession of such per se contraband" would subject the possessor to "criminal penalties," Plymouth Sedan, 380 U.S. at 699, but also because the "return of the contraband would clearly have frustrated the express public policy against the possession of such objects." 380 U.S. at 699.

Derivative contraband is property which is innocent by itself, but subject to forfeiture because the property has been illegally used. 380 U.S. at 699-700. Plymouth Sedan holds that the Fourth Amendment exclusionary rule is applicable to cases involving derivative contraband. 380 U.S. at 699-700.

Although the exact extent of the exclusionary rule has been subject to case-by-case development, United States v. Janis, 428 U.S. 433, 434 (1976), the Court in Janis did not

change the long-settled rule that a forfeiture proceeding is "quasi-criminal," citing Boyd, 116 U.S. at 634, and "clearly a penalty for the criminal offense," citing Plymouth Sedan, 380 U.S. at 701 and quoting from that decision the conclusion that it "would be anomalous indeed . . . to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." United States v. Janis, 428 U.S. at 447 n.17, quoting from 380 U.S. at 701.

The distinction between contraband per se and derivative contraband is crucial to the correct application of the Fourth Amendment to many forfeiture proceedings, including the instant proceeding.

The Pennsylvania Superior Court in the instant case recognized the controlling importance, when Fourth Amendment claims have been raised, of distinguishing contraband per se from derivative contraband; half its opinion is directed to an analysis of the distinction. A. 3-7; 369 A.2d at 802-03. The opinion correctly paraphrases from Plymouth Sedan the definition of contraband per se as "property the mere possession of which is unlawful," and the definition of derivative contraband as "property innocent by itself, but used in the perpetration of an unlawful act." A. 369 A.2d at 802.

The opinion next concluded that the Fourth Amendment would require in the instant case, as in Plymouth Sedan, that if "the property in question was derivative contraband, the exclusionary rule . . . was applicable in a proceeding

to forfeit the property," and the application of the exclusionary rule to the instant case, accepting as binding the unappealed finding that the seizure was in violation of the Fourth Amendment, required the return of property. "[I]f the property was derivative contraband, the [trial] court should have granted [Petitioner's] petition for the return of his property." A. 7 , 269 A.2d at 803. Stated conversely:

> "the [Common Pleas] court's order that the property be forfeited and destroyed was proper only if the property was contraband per se, so that [Petitioner's] repossession of it would subject him to criminal penalties." A. 7 , 369 A.2d at 803.

Having thus carefully analyzed the difference between contraband per se and derivative contraband, and having stated the result which was required if the property seized at Petitioner's home were determined to be only

derivative contraband, the Superior Court misconceived the nature of the property which was at issue in the appeal to that court.

As Petitioner's appeal was presented to the Superior Court, the firearms sought to be returned were firearms "innocent in themselves" and not subject to being deemed contraband per se. As to these descriptions, e.g., rifles, pistols, and ammunition, there was in 1971, and is now, no statute requiring registration or limiting possession of those items if possessed in Petitioner's home. Indeed, during the suppression hearing in the Municipal Court, the federal and City of Philadelphia officers constituting the raiding party could not explain why they had seized the rifles, pistols and ammunition. As the Municipal Court summarized the testimony:

> "No one, including Captain Martin [in charge of the seizure] could explain why the police seized and removed rifles, pistol[s] and ammunition other than that Deputy Police Commissioner Soloman ordered them to do so." Municipal Court Opinion on Motion to Suppress 13.

Since no contention was made at the time of seizure or during the forfeiture proceedings that rifles, pistols, and ammunition constituted "property the mere possession of which is unlawful," the definition stated in Plymouth Sedan as the definition of "contraband per se," the Superior Court should have ordered the return of those items pursuant to the Fourth Amendment as construed in Plymouth Sedan. That result was required by the Superior Court's own conclusion that Plymouth Sedan required that Petitioner's property be returned "if the property was derivative contraband . . . .", and that the Common Pleas

Court's order "was proper only if the property was contraband per se, so that appellant's repossession of it would subject him to criminal penalties." A. 7 , 369 A.2d at 803.

Moreover, the underlying failure correctly to apply the distinction between contraband per se and merely derivative contraband led the Superior Court to approve other violations of Petitioner's Fourth Amendment rights, of which the most striking violation is the approval by the Superior Court of the prosecution's use in the forfeiture stage of the instant case of exactly the evidence that had previously been suppressed. The clearest example is the use at the forfeiture stage of the same photographs of Petitioner's basement which had been suppressed during the trial

stage. The same analysis is applicable to Moyer's expert opinion "indicating" Petitioner was a dealer, since that opinion was based solely upon Moyer's observations of Petitioner's basement, while the seizure was being effected, and his observations of the weapons themselves. Moyer's observation of the "nature, quality and method of storage" of the rifles, pistols and ammunition, all innocent in themselves, to support his opinion "indicating" an unlicensed dealership, is identical, for purposes of the Fourth Amendment, with Pennsylvania's previous effort in Plymouth Sedan to use in the forfeiture stage of that case the evidence, previously suppressed, that the officers who searched the sedan had discovered 31 cases of untaxed liquor in the rear and trunk. As this

Court held in Plymouth Sedan:

> "In both the Boyd situation and here the essential question is whether evidence--in Boyd the books and records, here the results of the search of the car--the obtaining of which violates the Fourth Amendment may be relied upon to sustain a forfeiture." 380 U.S. at 698.

The Superior Court in the instant case seems to have adopted for Pennsylvania a rule that such evidence may be used to sustain a forfeiture if the property at issue is rifles, pistols and ammunition. That holding is in conflict with Plymouth Sedan.

B. Petitioner's Fourteenth Amendment rights under the due process clause were violated by the forfeiture of property without any evidence whatsoever to support the conclusion that Petitioner was an unlicensed dealer as defined in the Gun Control Act.

Separately and independently from the violation of Petitioner's Fourth

Amendment rights, the Superior Court's affirmance of the findings below would constitute a denial of Petitioner's rights to procedural due process under the Fourteenth Amendment, even if Moyer's testimony were received (in the form predicted by the offers of the prosecutor) and considered, because there is nothing in Moyer's observations and opinions which supports the conclusion that Petitioner had "engaged in the business of selling firearms or ammunition at wholesale or retail," the statutory definition of a "dealer" for purposes of the Gun Control Act of 1968, supra, at 6, 18 U.S.C. §921(a)(11). Petitioner's alleged "unlicensed dealing" in violation of 18 U.S.C. §922(a)(1) was the sole ground adopted by the Superior Court to sustain the forfeiture of the rifles, pistols, ammunition, and accessories. Opinion A. 11, 369 A.2d at 804.

Moyer's observation that Petitioner owned a large quantity of rifles, pistols, and ammunition no more establishes that Petitioner is an unlicensed dealer in such items than would an observation that a person owns a large quantity of stamps, or a large quantity of bottles of wine, or a large quantity of oil paintings, establish that such a person is a dealer in those items. The same reasoning which led the state courts in the instant case to determine that Petitioner was an unlicensed dealer in firearms would establish that a person with a substantial wine-cellar is an unlicensed dealer in wine; the presumption would be strengthened, in the prosecutor's view, if the owner of the wine-cellar was absent from the United States for two years and unable to drink any of

his collection. (Compare the prosecutor's Brief in the Superior Court at 23, asserting that Petitioner's two and a half year absence prior to the seizure is evidence that he was a dealer during that period as to the property in his basement.) Similarly, a collector who carefully prepared his paintings for storage during a long absence would, in the prosecutor's view, be presumed to be a dealer because of the quality of the packing materials and the fact that his paintings were not on display during his absence (Compare the prosecutor's offer covering testimony by Moyer at Tr. 33).

Since the prosecutor stipulated that Petitioner was licensed under the prior Federal Act until mid-1969 (Tr. 12-13) and also conceded that Petitioner had been absent from the United States

for two and one-half years prior to the seizure on June 20, 1971 (Brief for Appellee 23) the prosecutor's "unlicensed dealership" could have existed only while Petitioner was outside the United States, away from the weapons in his basement which have now been forfeited on the theory that they were his stock in trade.

Not only was "no direct evidence" presented "that [Petitioner] was involved in either retail or wholesale transactions with respect to the items that were seized from his home," as the prosecutor conceded (Brief 21), but also there was no indirect or circumstantial evidence of such transactions. Moreover, one of the elements relied upon by the Superior Court to establish the dealership is totally unsupported in the

record, lacking the support even of an offer of Moyer's speculative opinion. The Superior Court noted that Petitioner's contention that his property was a reference collection "was rebutted by the Commonwealth's expert testimony that the type of weapons and their duplication and manner of storage (export quality packaging) were not consistent with a 'reference collection' but rather indicated dealing." (Emphasis added.) A. 12-13, 369 A.2d at 805. In fact, no offer was made of any expert testimony which would have established that there were any duplicates in the collection. The contention concerning duplicates appears solely in the prosecutor's brief in the Superior Court at page 24, and is based solely upon counsel's reading of the Police inventory; if this contention had been

made previously, Petitioner would have explained the details which cause each alleged "duplicate" to be different from others of the same general description.

For example, the six "7mm caliber Mauser rifles" urged by the prosecutor to be "duplicates" on which a true collector, in the prosecutor's view "would not have wasted the money or valuable storage space" (Brief 24) are not duplicates at all. Petitioner's recollection is that his collection contained six such rifles, including a Belgian FN 1949 semi-automatic model, four bolt action models from different years and different countries: a Spanish 1893 carbine, a German 1888 carbine, a Nicaraguan 1898 rifle, and a Chilean 1898 rifle; and another FN 1949 model modified for Egypt with

Egyptian sights.

The instant case is substantially similar to both Thompson v. Louisville, 362 U.S. 199 (1960), and to the line of presumption cases which includes Tot v. United States, 319 U.S. 463 (1943), and Turner v. United States, 396 U.S. 398 (1970).

As in Thompson, no evidence was presented to prove that Petitioner had engaged in the conduct prohibited by the statute, i.e., evidence that Petitioner had "engaged in the business of selling firearms or ammunition at wholesale or retail...." 18 U.S.C. §921(a)(11). Instead, the Superior Court in the instant case approved a presumption of dealership which proceeds from the evidence of possession of a quantity of firearms, without any evidence that Petitioner ever engaged

in the business of selling those firearms. Such reasoning has been held by this Court to violate due process of law even when supported by express Congressional findings. Even as to possession of heroin, if the fact to be established is dispensing or distributing, "the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts." Turner v. United States, 396 U.S. at 421. Nor is the Superior Court's reasoning in the instant case any less "arbitrary" than the statutory presumptions under the prior Federal Firearms Act, 52 Stat. 1250, which were held unconstitutional in Tot v. United States, 319 U.S. at 467-68.

An additional reason for the application of the rule of Thompson v. Louisville to the instant case is that the Common Pleas Court in fact received

no evidence, except for the photographs of the basement and a few stipulations between counsel. The "Commonwealth's expert testimony" relied on by the Superior Court A. 12 , 369 A.2d at 805, was nothing but an offer of proof of what Moyer would say, and was contradicted by the opposing offers of Petitioner's expert and Petitioner's own testimony to deny any transactions (Tr. 46-49). Although the informal procedure of cross-offers of proof, as used by the Common Pleas Court, might be useful and proper in some circumstances, it accomplished a denial of due process of law in the instant case. The Common Pleas Court received, over objection by Petitioner's counsel, an offer of speculative expert testimony from the prosecution, which was met by Petitioner's own offer of his own direct testimony

on the controlling factual issue (i.e., whether Petitioner engaged in any transactions) as well as by an offer of expert testimony to rebutt the prosecution's offer.

Without hearing any of the witnesses, the Common Pleas Court resolved the issue of unlicensed dealership in favor of the prosecution. That procedure provides no more sound a basis for the forfeiture of Petitioner's property than did the unjustified conclusions drawn from the actual testimony in Thompson v. Louisville. The Thompson case was reversed because it is "a violation of due process to convict and punish a man without evidence of his guilt." 362 U.S. at 206. It is equally a violation of due process to forfeit a man's property solely on the basis of an alleged violation of the Gun Control Act, without any

evidence that Petitioner, during the two and one-half years prior to June 20, 1971, or at any other time, ever engaged in any transactions, wholesale or retail, or "engaged in the business of selling firearms or ammunition at wholesale or retail," the definition set forth in the Act. 18 U.S.C. §921(a)(11).

C. The construction of the Gun Control Act adopted by the court below is contrary to the Act and in conflict with all Courts of Appeals decisions on the evidence required to establish unlicensed dealing.

The Superior Court's holding that a violation of the dealership provision of the Gun Control Act, 18 U.S.C. § 922(a)(1), could be established without any evidence of transactions in firearms or of Petitioner having otherwise "engaged

in the business of selling firearms or ammunition at wholesale or retail," the definition of "dealing" stated in, 18 U.S.C. § 921(a)(11), has resulted in a construction of the Act which is contrary not only to the text but also to the intention of Congress as revealed in the legislative history of the Act.

The conclusion of the Superior Court that possession of a quantity of rifles, pistols, and ammunition is sufficient to establish a violation of the Act, without evidence of transactions, appears to be contrary to the reasoning of every Court of Appeals decision interpreting this part of the Act.

The prior decisions construing 18 U.S.C. § 922(a)(1) and the definition contained in the preceding section, 18 U.S.C. § 921(a)(11), are not consistent

among the Circuits. See Annotation, "What Constitutes Unlawful 'Dealing in Firearms or Ammunition' under 18 U.S.C.S. § 922(a)(1), 32 A.L.R. Fed. 946 (1977)." Some decisions have held that "business" as used in the Act "is commonly understood to mean an activity engaging some of one's time, attention and effort and performed in expectation of profit or other benefits . . . ." United States v. King, 532 F.2d 505, 510 (5th Cir.) cert. denied, 429 U.S. 960 (1976). Another case which adopts the "livelihood or profit" criteria is United States v. Gross, 451 F.2d 1355, 1357 (7th Cir. 1971), holding that

> "There appears to be little doubt that 'dealer' means anyone who is engaged in any business of selling firearms, and that 'business' is that which occupies time, attention and labor for the purpose of livelihood or profit." (Emphasis by the court.)

United States v. Day, 476 F.2d 562, 567 (6th Cir. 1973), approves an instruction taken from the above-quoted language of Gross.

Other cases, including United States v. Swinton, 521 F.2d 1255, 1258-59 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1976), have rejected the contention that the "Government must establish a profit as part of its case-in-chief."

But until the decision of the Superior Court in the instant case, no court, to the best knowledge of counsel, has held that a violation of 18 U.S.C. § 922(a)(1) can be established without evidence of at least one transaction. In Swinton, the Tenth Circuit expressly held that a single transaction between the defendant and a Treasury agent

> "standing alone, without more, would not have been sufficient to establish a

> violation of § 922(a)(1). That sale, however, when considered in conjunction with other facts and circumstances related herein, established that Swinton was engaged in the business of dealing in firearms . . . . The unrebutted evidence of the Government established not only that Swinton considered himself to be and held himself out as a dealer, but that, most importantly, he was actively engaged in the business of dealing in guns." 521 F.2d at 1259.

The Government has taken the same position during prosecutions under the Act. The decision in United States v. Jackson, 352 F.Supp. 672 (S.D. Ohio 1972) aff'd , 480 F.2d 927 (1973), quotes with approval the Government's interpretation, as stated in its brief:

> "Congress did not intend to place unnecessary restrictions on law-abiding citizens who may wish to dispose of a firearm in the state of his residence. Accordingly, an isolated sale in his home state would not place a citizen in the business of dealing in firearms, in

> the absence of other characteristics indicative of such business." 352 F.Supp. at 677.

The holding in the instant case is unique in finding a violation of Section 922(a)(1), albeit by a supposed "preponderance of the evidence", A. 12, 369 A.2d at 804, in the absence of any evidence of even a single transaction and in the face of Petitioner's uncontradicted offer of proof that no transactions occurred (Tr. 46-47). The effect of the Superior Court's decision is to interfere with the activities of "law-abiding citizens", including persons who engage in "gun collecting," an activity intended by Congress to be distinguished from those activities subjected to regulation. See Huddleston v. United States, 415 U.S. 814, 828 n.9.

Review of the instant decision is required in order to

define the nature of the evidence which is required to establish a violation of the Act, and avoid the creation in the future of a line of cases, based on the decision below, in which mere possession of a quantity of firearms is held to be sufficient to support a forfeiture or a conviction.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted to review that portion of the judgment of the Superior Court which affirmed the forfeiture of Petitioner's rifles, pistols, ammunition and accessories.

Respectfully submitted,

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Of Counsel:

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August 2, 1978

IN THE SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1975
V.	:	
GEORGE FASSNACHT	:	NO. 705

Argued June 16, 1975.
Decided February 18, 1977.

O P I N I O N

SPAETH, Judge:

On June 20, 1971, officers of the Philadelphia Police Department searched appellant's home in Northeast Philadelphia, and found stored in the basement an arsenal of weapons and explosives, ranging from several hundred automatic machine guns, rifles, and pistols to military knives and swords, and a machete. This property was seized by the police, and appellant was arrested and charged with several criminal offenses relating to possession and dealing in weapons and explosives. However, because

the weapons and explosives had been seized in violation of the Fourth Amendment, appellant's motion to suppress their use as evidence was granted, with the result that appellant was found not guilty.

On April 19, 1974, appellant filed a petition for the return of his property. By order of June 5, 1975, the lower court denied the petition, and ordered the property forfeited and destroyed. This appeal is from that order. Pending disposition of the appeal, a supersedeas was granted to stay the destruction of the property. We now dissolve the supersedeas, affirm the order of the lower court in part, and reverse in part.

A petition for the return of property is authorized by Pa.R.Cr.P. 324, which permits the return of property seized with or without a warrant "unless the court determines that such property is contraband, in which case the court may order the property to be forfeited." Pa.R.Cr.P. 324(b).

Here the lower court determined that the property was contraband.

The law of contraband is ancient[1] but evolving. Originally a forfeiture proceeding was considered a purely in rem civil action against the property. Courts have come to recognize, however, that in substance the proceeding may be more criminal than civil, and consequently they will afford the owner some of the procedural safeguards normally relevant only to criminal actions.[2] One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965).

In this evolution, two distinct

1. See generally, The Goring Ox: Some Historical Perspectives on Deordands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 Temp.L.Q. 169 (1973).
2. For discussion of the historical background and procedural evolution of the law of contraband, see Commonwealth v. Landy, 240 Pa.Super. 458, 362 A.2d 999 (1976).

classifications of contraband have been developed: contraband per se, and derivative contraband. Contraband per se is property the mere possession of which is unlawful. One 1958 Plymouth Sedan, supra; United States v. One Lot of Eighteen Firearms, 325 F.Supp. 1326 (D.N.H. 1971). Heroin and "moonshine" whiskey are examples of contraband per se. Derivative contraband is property innocent by itself, but used in the perpetration of an unlawful act. An example of derivative contraband is a truck used to transport illicit goods. Most jurisdictions have procedures by which derivative contraband may be forfeited.[3]

However, in a forfeiture proceeding, derivative contraband will be treated differently from contraband per se. In One 1958 Plymouth Sedan, supra, the Commonwealth of

3. Compare, 49 U.S.C. §782; 35 P.S. §780-128 (a)(4); 47 P.S. §6-601 et seq.; 72 P.S. §3169.1001 (1976 Supp.).

Pennsylvania sought the forfeiture of an automobile used to transport untaxed liquor. It appeared that officers of the Pennsylvania Liquor Control Board had searched the automobile and seized the liquor without probable cause. The hearing judge denied the forfeiture petition on the ground that forfeiture of the automobile depended upon the admission of evidence seized in violation of the Fourth Amendment as applied to the States by the Fourteenth Amendment. This court reversed, and directed that the automobile be forfeited, 199 Pa. Superior Ct. 428, 186 A.2d 52 (1962) and on further appeal, the Supreme Court affirmed our order, 414 Pa. 540, 201 A.2d 427 (1964). The United States Supreme Court granted certiorari, and reversed, holding that when the property in question was derivative contraband, the exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), was applicable in a proceeding to forfeit the

property. The Court recognized that in United States v. Jeffers, 342 U.S. 48 (1951), and Trupiano v. United States, 334 U.S. 699 (1948), it had been said in dictum that the fact that contraband was inadmissible in a criminal prosecution, because seized in violation of the Fourth Amendment, did not mean that the government was obliged to return it. In those cases, however, the contraband was contraband per se - in Jeffers, illegally imported narcotics, and in Trupiano, a still, alcohol, and mash. The Court explained that

> repossession of such per se contraband by Jeffers and Trupiano would have subjected them to criminal penalties. The return of the contraband would clearly have frustrated the express public policy against the possession of such objects.

Id. at 699.

In the present case, as has been mentioned, it appears that in the criminal prosecutions against appellant, appellant's motion to suppress the property seized in his

home was granted on the ground that the property had been seized in violation of the Fourth Amendment. Consequently, if the property was derivative contraband, the lower court should have granted appellant's petition for the return of his property. One 1958 Plymouth Sedan, supra. The lower court's order that the property be forfeited and destroyed was proper only if the property was contraband per se, so that appellant's repossession of it would subject him to criminal penalties. One 1958 Plymouth Sedan, supra; United States v. Jeffers, supra; Trupiano v. United States, supra.

To determine whether property is contraband, and if so, what type of contraband, one must refer to the nature of the property and to the statute or statutes that it is contended make possession of the property or its use unlawful. Commonwealth v. Landy, 240 Pa.Super. 458, 362 A.2d 999 (1976).

Several different methods of describing the property seized in appellant's home have been used by the parties. For purposes of our discussion, we shall adopt the classifications suggested by appellant in his brief to this court. Brief of Appellant at 3-4. These classifications are as follows:

1. Automatic weapons, machine guns, and automatic pistols;
2. Six pistols with shoulderstocks;
3. One silencer for a pistol;
4. Pistols;
5. Rifles;
6. Knives, swords, and a machete;
7. Ammunition;
8. Weapon parts, including parts for machine guns and automatic pistols, as well as parts for regular rifles and pistols;
9. Ammunition magazines and ammunition clips for both automatic and regular weapons;
10. Items that the Commonwealth has agreed to return; [4]

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4. Appellant includes this classification of items in his appeal although there was no finding by the lower court that these items are contraband. Appellant, however, "would remind [this court] that even

11. A propelling charge and a grenade simulator;
12. Containers of sporting gun powder, which powder is smokeless and non-explosive;
13. Containers of black sporting powder;
14. Destructive devices or explosives, plastic explosives, electric squibs, TNT and hand grenade fuses;
15. Pyrotechnics and fireworks.

Except for the items in Classification 10, [5] the lower court found all of the property to be contraband. On this appeal, appellant challenge that finding only with respect to some of the classifications. He does not appeal as to the following

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continued
though it has agreed to retain [sic - return?] these items, the Commonwealth has not yet done so." Brief of Appellant at 17. If appellant has a complaint that the Commonwealth has breached some agreement, his recourse in the first instance is not to this court.

5. See footnote 4, supra.

classifications: (1) automatic weapons, machine guns, and automatic pistols; (2) six pistols and shoulderstocks; (3) one silencer for a pistol; (11) a propelling charge and a grenade simulator; (14) destructive devices or explosives, plastic explosives, electric squibs, TNT and hand grenade fuses; and (15) pyrotechnics and fireworks. Accordingly, we need only review the lower court's finding of contraband as to these classifications: (4) pistols; (5) rifles; (6) knives, swords, and a machete; (7) ammunition; (8) weapon parts, including parts for machine guns and automatic pistols, as well as parts for regular rifles and pistols; (9) ammunition magazines and ammunition clips for both automatic and regular weapons; (12) containers of sporting gun powder, which powder is smokeless and non-explosive; and (13) containers of black sporting powder.

Classifications 4, 5, 7, 8 and 9.

The pistols, rifles, ammunition, weapon parts, and ammunition magazines and clips may be dealt with together. The lower court cited a string of statutes that prohibit appellant's possession or use of these items.[6] However, we need look no further than the Federal Gun Control Act of 1968, 18 U.S.C. §921 et seq.

The Gun Control Act prohibits unlicensed dealing in firearms and ammunition. §922(a)(1). The question before the lower court, therefore, was whether appellant had engaged in such dealing. Since this is a forfeiture proceeding, proof of the elements

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6. 26 U.S.C. §5861; 26 I.R.C. §178 et seq.; 18 U.S.C. §921 et seq.; 18 U.S.C. §841 et seq.; 18 Pa. C.S. §6112 et seq.; 35 P.S. §1271 et seq.; Philadelphia City Ordinances §5-1001 et seq., and §10-814 et seq.

of unlicensed dealing was not requied beyond a reasonable doubt, but only by a preponderance of the evidence. Commonwealth v. Landy, supra.; Commonwealth v. One 1927 Graham Truck, 165 Pa. Superior Ct. 1, 67 A.2d 655 (1949); Commonwealth v. 3 Halves of Beer, 162 Pa. Superior Ct. 191, 56 A.2d 333 (1948).

Applying this standard, the lower court found that appellant had engaged in unlicensed dealing. The court particularly relied on the evidence of the "nature, quality and method of storage" of the items and ammunition. Appellant contended that the items were only a "reference collection" for his use as a "forensic ballistics expert". This contention was rebutted by the Commonwealth's expert testimony that the type of weapons and their duplication and manner of storage (export quality packaging) were not consistent with a "reference collection"

but rather indicated dealing. The Commonwealth also introduced evidence that the files of the appropriate federal agencies disclosed no dealer's license for appellant.

On this record we have no difficulty in concluding that the lower court was justified in finding by a preponderance of the evidence that appellant had engaged in unlicensed dealing in violation of the Gun Control Act. It follows that the pistols, rifles, weapons parts, and ammunition magazines and clips were contraband per se, and therefore could be forfeited; appellant's repossession of them would enable him to resume dealing in them and hence "would clearly . . . frustrate [] the express public policy against the possession of such objects." One 1958 Plymouth Sedan, supra at 699.[7]

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7. The Gun Control Act itself provides for forfeiture of these items. 18 U.S.C. §924(d).

It may be added in this regard that the lower court did not err in including the weapons parts as contraband, for the Gun Control Act includes those in its prohibition. 18 U.S.C. §921(a)(3)(B). The same may be said of the court's inclusion of the ammunition magazines and clips, which are within the definition of "Ammunition" in the Gun Control Act and may not be dealt with without a license. 18 U.S.C. §921(a)(17).

Classification 12 and 13.

It will be convenient to consider these in reverse order.

As to classification 13 (containers of black sporting powder), the lower court properly found that appellant's possession of the powder was prohibited by 73 P.S. §151 et seq.[8], which regulates the storage of

8. Act of July 1, 1937, P.L. 2681, §1 et seq., as amended 73 P.S. §151 et seq.

explosives, and by Philadelphia City Ordinances §5-1001 et seq., which make it unlawful to possess in the city explosives in the amount taken from appellant's home. The explosives were therefore contraband per se and were correctly forfeited.

As to classification 12 (containers of sporting gun powder, which is smokeless and non-explosive), appellant seeks to distinguish this gun powder from the "explosive" gun powder regulated by statute and ordinance. We need not respond to that argument since the lower court properly found that appellant did not comply with the Act of March 20, 1856, P.L. 137, §6, 53 P.S. §16568, which establishes a statute of limitations on petitions for the return of gunpowder in Philadelphia. Since appellant did not file his petition for return of the gunpowder within the specified three months of time

seizure, his petition was properly denied and appellant cannot object to the gunpowder being forfeited.

Classification 6

The lower court found these items (knives, swords, and a machete) to be contraband and subject to forfeiture. However, the court cited only the Prohibited Offensive Weapons statute, Act of Dec. 6, 1972, P.L. ____, No. 334, §1, 18 Pa.C.S. §908, which become effective on July 6, 1973, well after the June, 1971, seizure of appellant's property. It may be that the court did not mean that appellant's possession in 1971 was prohibited, but, rather, was speaking to the fact that these weapons were contraband per se since return of them to appellant now would put him in violation of the law. However, this may be, we are unable to review the lower court's findings with

respect to this classification. Despite diligent efforts on part of the Superior Court Prothonotary, we have been able to procure only part of the record. The part we have does not include evidence with respect to classification 6. Nor do we have any findings of fact and conclusions of law by the lower court on this classification. We are compelled, therefore, to reverse the lower court's order as to the knives, swords, and machete and remand for findings of fact and conclusions of law with respect to this property.

The order of the lower court is affirmed except as regards the knives, swords, and machete, as to which the order is reversed and the case remanded for further proceedings consistent with this opinion.

HOFFMAN, J., did not participate in the consideration or decision of this case.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED EXCEPT AS REGARDS THE KNIVES, SWORDS, AND MACHETE, AS TO WHICH THE ORDER IS REVERSED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

BY THE COURT:

/s/
Prothonotary

Dated: February 18, 1977

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	Philadelphia District
GEORGE FASSNACHT, Appellant	:	705 October Term 1975

O R D E R

AND NOW, this 8th day of March, 1977, upon consideration of Appellant's Petition for Reargument, it is hereby ORDERED that the Petition for Reargument is denied.

Upon consideration of Appellant's Petition for Supersedeas, it is hereby ORDERED that if a petition for allocatur to the Supreme Court has been filed, the Order of Supersedeas previously entered by this court is reinstated, to remain in effect until the Supreme Court has acted on the petition. If no petition for allocatur has been filed, the Petition for Supersedeas is denied.

PER CURIAM

ORDERS OF THE SUPREME COURT
OF PENNSYLVANIA

Eastern District

Order endorsed on the Petition for Allowance of Appeal:

"August 5, 1977

Petition Denied

Per Curiam"

Order entered on the Application for Re-Consideration of Denial of Allowance of Appeal:

"April 4, 1978

Application Denied

Per Curiam".

COMMONWELATH OF PENNSYLVANIA : COURT OF COMMON PLEAS

v. : TRIAL DIVISION

GEORGE FASSNACHT : MISC. DIV. 74-00-2013

PETITION FOR RETURN OF PROPERTY

MEMORANDUM OPINION

On June 20, 1971, members of the Philadelphia Police Department seized and removed a vast quantity of weapons and munitions from the basement of Petitioner, Geroge Fassnacht's home at 528 Rhawn Street, Philadelphia, Pennsylvania. This "arsenal" consisted of, inter alia, almost two hundred pounds of gun powder and explosives, several hundred machine guns, rifles and pistols, and over 363,000 rounds of live ammunition. Thereafter, on June 24, 1971, petitioner was arrested and charged with trafficking in machine guns and possession of explosives with regard to these items and others recovered at 5414 Large

Street, Philadelphia, Pennsylvania. A Motion to Suppress Evidence was granted as to all the items discovered at 528 Rhawn Street; thereby precluding the Commonwealth's efforts to criminally prosecute petitioner for the possession of these items. On April 19, 1974, petitioner filed a Petition for the Return of the Property to which the Commonwealth answered and filed its Motion to Dismiss Petition for Return of Property. Thereafter, on July 16, 1974, this matter was heard on oral argument and held under advisement pending the submission of briefs. The matter is presently before this Court on Petitions and Answers and Supplemental Briefs thereto.

For purposes of clarity, reference will be made to the items sought to be returned by Petitioner as

follows:

(1) automatic weapons, machine guns and automatic pistols;

(2) six pistols with shoulder stocks, and one silencer for a pistol;

(3) destructive devices or explosives, plastic explosives, electrical squibs, T.N.T. and hand grenade fuses;

(4) rifles;

(5) knives, swords and a machete;

(6) ammunition;

(7) pyrotechnics and fireworks;

(8) weapon parts, including parts for machine guns and automatic pistols, as well as parts for regular rifles and pistols;

(9) ammunition magazines and ammunition clips for both automatic and regular weapons;

(10) items that the Commonwealth has agreed to return on July 18, 1974;

(11) containers of sporting gun powder;

(12) containers of black sporting powder.

Numerous cases from the federal and state courts have held that the mere fact that possession of forfeitable property was obtained by the government as the result of an unauthorized or illegal taking does not preclude its forfeiture. One 1958 Plymouth Sedan vs Commonwealth of Pennsylvania, 380 U.S. 693 (1965) and cases cited therein. The Supreme Court in United States vs Jeffers, 342 U.S. 48 (1951) and Trupiano vs United States, 334 U.S. 699 (1958) stated by way of dictum, however, since the point was not before it, that its ruling that the contraband was excludable as illegally seized did not mean that the Government was required to return the illegally imported narcotics to Jeffers or the unregistered still, alcohol and mash to Trupiano. The Court held in Plymouth Sedan, supra, that property is contraband per se, when the possession of

it without more constitutes a crime and what the return of such property to the defendant would subject him to criminal liability. These cases appear to be right on target with the issues that are before us and the return of the petitioned items would be legally inappropriate.

This proceeding is in rem since the property sought is considered contraband. Contraband, of course, are goods or articles whose use or possession are prohibited or against the law. The Commonwealth has adequately established that it was unlawful for petitioner to possess said articles: therefore, a "prima facie" case has been presented and the burden of proof shifts to the petitioner to show that possession of said articles was not unlawful. Pannulla vs Rosenberg, 171 Pa. Superior

Ct. 233 (1952) and Nu-Ken Novelty, Inc., vs Heller, 220 Pa. Superior Ct. 431 (1972). Petitioner has failed to rebut the Commonwealth's contentions. It is obvious to this Court that petitioner has done nothing more than make negative statements contra the Commonwealth's theories and propositions. There clearly is a paucity of case authorities or legal principles presented by petitioner. Petitioner admits that he is is not seeking the return of any property which is contraband or any property, the return of which would subject the petitioner to criminal liability. The assertion by petitioner, that the Commonwealth's legal argument on contraband are irrelevant, is specious. What petitioner fails to realize is that the Commonwealth correctly avers that all of the articles recovered are contraband except for those that the Commonwealth has agreed to return.

The possession of certain of said articles are prohibited by Pennsylvania and Federal statutes and therefore are forfeitable as contraband. Pennsylvania Statute, 18 C.P.S.A. §906, Prohibited Offensive Weapons, would apply to the items included in categories (1), (2) and (5) above. The Philadelphia Code §5-1004 pg. 310 explicitly provides, inter alia, that (1) no person shall have, keep or store explosives unless he has obtained a permit as provided in §5-4101. In addition, 73 P.S. §151 et seq contains the regulations pertaining to explosives. Both laws explicitly provide that the possession of items which fall into category (3) above is prohibited unless the possessor is licensed and said items duly registered. There has been testimony, by a custodian of record as to licensed dealers in explosives in the City of Philadelphia,

that petitioner did not possess the license as required by the City and the State. Petitioner admits that black sporting powder, category (12) above, is an explosive and that the City Ordinance prohibits storage of more than two pounds of such powder in one dwelling at a time. In addition, under the State Statute 53 P.S. §16568 (Suits for recovery of gunpowder, etc., seized) all actions or suits for recovery of any gunpowder shall be instituted within 3 months after such seizure shall have been actually made, and if not, said gunpower is absolutely forfeited. Since petitioner did not proceed in compliance with this statute, assuming arguendo that we found such gunpowder was not contraband, it still should not be returned.

Moreover, the possession of the items included in categories (1),

(2), (3) above is prohibited under federal statute. Roberta J. Carr, Supervisor of the Firearms Licensing Section in the Office of the Regional Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Mid-Atlantic Region, Philadelphia, Pennsylvania, submitted a written statement that provided in part:

> "Our records indicate that License #23-1210, bearing expiration date of April 19, 1969 was issued to George E. Fassnacht, 528 Rhawn Street, Philadelphia, Pennsylvania, 19111, under the provisions of the Federal Firearms Act (U.S.C. Title 15, Chapter 18.) Our records also indicate that Mr. Fassnacht's license expired on April 19, 1969 and that he did not reapply for a federal firearms license under the provisions of the Gun Control Act of 1968 (Title 18, U.S.C. Chapter 44, Section 921 et seq.) during the period from April 19, 1969 through July 15, 1974 anywhere within the geographic limits of the Mid-Atlantic Region which includes the states of Pennsylvania..."

This Court agrees with the Commonwealth's averment that "The nature, quantity and method of storage of the items that are contraband by statute and certain other items (the non-automatic rifles and ammunition, gun parts and magazines) establish that petitioner was an unlicensed dealer in firearms and ammunition, in violation of both Pennsylvania and federal laws covering both the licensing of the dealers and the storage of the items to be sold, and that these items are contraband" and therefore not subject to be returned.

There are specific federal and state laws to which the petitioner has obviously not complied. Many of these have been mentioned before, but this Court feels the necessity to indicate that petitioner has violated the following statutes pertaining to

the registration of dealers in firearms and explosives: 26 U.S.C.A. §5861, 26 I.R.S. §178 et seq., 18 U.S.C.A. §921 et seq., 18 U.S.C.A. §841 et seq., 18 P.S. §6112 et seq., 35 P.S. §1271 et seq., City Ordinance §5-1001 et seq., §10-814 et seq. We view, with skepticism, petitioner's claim that these items were a "reference collection". It has been settled that petitioner was not currently licensed as a dealer in firearms or ammunition either in Pennsylvania or with the Federal government as required by law, nor as a collector. The size of this "reference collection" is astounding. The quantity of weapons, explosives and other destructive devices are far in excess of what a collector would normally possess. Petitioner claims that he is not an ordinary collector but forensic ballistics expert who can be expected to require

a lifetime supply of all types of ammunition. We do not accept this argument, but in the alternative, assuming this is true, this Court cannot condone Petitioner's practices since they are in violation of criminal statutes. It can be reasonable inferred from the evidence in record that the only logical explanation for petitioner's possession of the "arsenal" is that he was an unlicensed dealer and not a collector.

The type, quantity and means of storage of these items were not in the best interest and welfare of the neighborhood or community. Petitioner has admitted that the black powder was not stored as required by federal law. The explosives were precariously stored next to the heater, and we feel that the cache of ammunition, if caused to explode, would be a veritable "bomb".

The premises, 528 Rhawn Street, is lcoated in a contiguous area comprised of residences, two elementary schools, two churches, a hospital, a home for the aged, and numerous other commercial premises. Certainly, it would be in the community's best interest to reduce the hazard to persons and property arising from the misuse and unsafe or insecure storage of these explosive materials. Petitioner has created a hazardous or physically offensive condition by an act which appears unlawful; therefore, this Court is disposed to order all the items (except those the Commonwealth has already agreed to return) forfeited to the Commonwealth.

In addition, a list of items, due to their identity as property of the United States Government, may be considered as contraband if the

petitioner cannot produce a receipt of sale. No evidence of the ownership of any of these items, or, for that matter, any of the items in the Commonwealth's possession has been produced. Petitioner has made bald allegations that the items taken from his home are his. This in itself is not enough.

Accordingly, it is therefore ORDERED AND DECREED that the Petition for the Return of Property is denied. Material is ordered destroyed.

BY THE COURT:

/s/ Hirsh
J.

Date: 6-6-75

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	JUNE TERM, 1971
V.	:	
GEORGE E. FASSNACHT	:	No. 2556

- - - - - - - - - - - - - - - -

O P I N I O N

DOTY,A.J. - - - - - - - - - - - - - - - -

This matter is before the Court for consideration of the Commonwealth's appeal from an Order dated October 27, 1972 of the Municipal Court of Philadelphia (Judge Murphy) granting defendant's motion "for the suppression of all evidence arising from the searches of premises 528 Rhawn Street and 5414 Large Street." In addition, the defendant also filed a petition to quash this appeal. Both the Commonwealth's appeal and the petition to quash the appeal were

originally filed in the Superior Court of Pennsylvania which refused defendant's petition to quash the appeal and remanded the Commonwealth's appeal to the Common Pleas Court of Philadelphia. See Commonwealth v. Hallowell, 223 Pa. Superior Court 440 (1973). After a careful consideration of the entire record and the applicable law, we are convinced that defendant's petition to quash the appeal must be denied. We are also convinced that the Commonwealth's appeal must be sustained in part and denied in part.

The thrust of defendant's petition to quash the appeal (and thus terminate this litigation) is based upon the defendant's assertion that defendant surrendered himself to the Philadelphia police on June 24, 1971 and more than two years has elspsed since that date without an indictment being returned against him: 19. P.S. 211. In the instant

case, any delay in indictment was due not to any fault of the Commonwealth but rather to pre-trial procedures utilized by the defendant himself. Therefore he should not be heard to complain that he has not yet been indicted. We do not say this in criticism; a defendant has the perfect right to utilize certain pre-trial procedures to test the propriety of his arrest, the validity of the search and seizure, and a confession obtained by the police, etc. However, when the delay in obtaining an indictment is necessitated by the filing of such pre-trial petitions, and the court's consideration thereof, it would be manifestly unfair to deprive the Commonwealth of its duty to bring the defendant to trial.

Moreover, a motion to quash an indictment by its very nature is filed after an indictment is returned by the grand jury.

Furthermore, no indictment is obtained in criminal proceedings which are commenced in the Municipal Court of Philadelphia. Originally a defendant is brought to trial in that court and his motion to suppress the evidence is heard at the time of his trial. In this case because of the complexity of issues presented by the defendant's pre-trial motion (there were over one thousand pages of testimony taken in consideration of this motion) a great deal of time had to be given for the proper consideration and disposition of the motion. Therefore, we are firmly of the opinion that these proceedings in the Municipal Court tolled the running of the statute of limitations. Under all of these circumstances, defendant's petition to quash must be denied.

In consideration of the appeal itself, no purpose would be served by repeating

the entire factual background in this matter. This has been stated most ably by Judge Murphy in his opinion which accompanied the order hereinabove referred to. Suffice to say for the purpose of this appeal, the Philadelphia Police Department on June 19, 1971 at approximately 9 P.M. received information which led them to believe that explosives were stored in the basement of 5414 Large Street, Philadelphia. Nevertheless, it was not until approximately midnight when a detective was assigned to secure a search and seizure warrant for that premises and was not until 2:30 A.M., on June 20, 1971 that the warrant was secured.

Certain members of the Philadelphia Police Department then proceeded to 5414 Large Street arriving at approximately 3 A.M. They announced themselves to Miss Marie Tobin, one of the occupants of that premises and

and presented her with a copy of the search warrant. Miss Tobin told the police "you do not need it, you can go anywhere you want".

In connection with the search of the Large Street property and seizure of the items therein we conclude as a matter of law: (1) that the police possessed a valid search and seizure warrant based upon probable cause; (2) that the police received valid consent from one of the occupants to enter and search the premises.

In view of these conclusions, it is unnecessary for us to consider the Commonwealth's contention that the defendant lacks standing to question the validity of this search and seizure, since he neither resided nor was present herein at the time, although we were inclined to agree with the Commonwealth's contention in this regard. See

Jones v. United States, 363 U.S. 257 (1960).

Resuming our narrative for the purpose of this opinion, when the police went to the basement of the Large Street premises they observed two cartons and upon opening the cartons they found therein a Thompson sub-machine gun and some other automatic weapons. The police had been informed by Miss Tobin that Mrs. Jane Fassnacht (defendant's wife) and the defendant had stored various items (the contents which were unknown to Miss Tobin) in the Large Street basement prior to the evening in question. The police were also informed that on the evening of June 19, 1971 Miss Tobin and two friends came to the Large Street property and removed everything which had been stored there except the two cartons previously referred to.

Although the police had arrived at the Large Street property at 3 A.M., on

June 20, 1971 and had examined the contents in the basement of that property at that time, they did not go to the 528 Rhawn Street, Philadelphia until at least 4:30 A.M., that morning and some testimony indicates that the police did not arrive at the Rhawn Street property until at least 5 A.M. At this point we quote verbatim from Judge Murphy's opinion:

> "Although the police arrived at Large Street at approximately 3:00 A.M. (N.T. p. 730), and although Miss Tobin had called Mrs. Fassnacht the previous evening, Sergeant McLaughlin explains the delay in proceeding to 528 Rhawn Street by stating that Miss Tobin did not know Mrs. Fassnach's exact address and took approximately twenty minutes to find her telephone number. He then called Detective Captain Royds at the Night Command for the street address at about 3:30 A.M. and received it about five minutes before they left the house (N.T. p. 757) at about 4:00 A.M. (N.T. p. 770).
>
> Although the police knew at 9:00 P.M. on June 19, 1971 that explosives were stored at 5414 Large Street, and had received this information from what they considered a reliable source, no

assignment of the case was made until 12:05 A.M. on June 20, 1971 and no action was taken until 3:00 A.M. when they had obtained and served a Search Warrant on Miss Tobin.

Prior to leaving Large Street, Sergeant McLaughlin had discussed with Captain Royds the obtaining of a Warrant for Rhawn Street but felt it better to move immediately (N.T. p. 761) even though there would be no more nor no less a danger at the Fassnacht resident than at Tobin's. Moreover, Captain Royds had all the information necessary to obtain a Warrant. For some reason the Sergeant now considered it an emergency, "extremely so" (N.T. p. 756) and action had to be taken immediately because of a cellar-full of arms and explosives (N.T. p. 769). The word "cellarful" was explained to be mistake in his wording. However, the police knew they were on tenous ground, for the Sergeant admits "without permission; I knew I needed a Search Warrant". (N.T. p. 800). In fact, the police really did not plan any search unless they could get consent. (N.T. p. 812).

It is axiomatic that in the absence of an "emergency situation", a search to be valid must rest upon one of three grounds. One, it must be incident to a valid arrest. There was

no arrest of Mr. Fassnacht or anyone else in this case at that time (the defendant was not present in the house at the time of the search and seizure). Two, the search must be pursuant to a valid warrant based upon probable cause. The Commonwealth concedes that the police did not have a warrant at the time of the search. Three, the search must be pursuant to an intelligent and voluntary consent. We conclude as a matter of law that there was no valid consent given by Mrs. Fassnacht in this case. Sergeant McLaughlin, one of the police officers, who proceeded to the Rhawn Street property, stated that he knocked on the door and when Mrs. Fassnacht appeared in her nightclothes, he identified himself. The sergeant admitted that Mrs. Fassnacht told him that he would need a warrant to enter

the premises. Moreover, Officer Zalenski testified before Judge Murphy and stated that he had gone to the premises independently of Sergeant McLaughlin and also acknowledged that Mrs. Fassnacht had said to him, "I think it would be better if you got a warrant" (N.T. p. 31). Captain Murphy of the police department also acknowledged that he heard Mrs. Fassnacht advise the officers that they better get a warrant before she would permit them to search the premises.

At the hearing before Judge Murphy, Mrs. Fassnacht, who was eight and one-half months pregnant on the evening in question, stated that police officers arrived at her home at approximately 5 A.M. She stated that despite her repeated requests that the officers obtain a warrant, several officers remained in her house

at all times; that at no time (contrary to the officers' testimony) did they all leave and then return. She was quite emphatic in stating that she never gave police permission to enter and search her premises.

The Commonwealth's brief presented to this Court contains this statement:

> "For the purpose of this appeal, it is unimportant how the police secured entry and permission to search 528 Rhawn Street. The court below Ruled as a matter of fact and credibility that Mrs. Fassnacht did not consent to the search. It is undisputed that the police had no search warrant when they arrived at 528 Rhawn Street and it is undisputed as well that police were admitted to the house itself by Mrs. Fassnacht. Mrs. Fassnacht denied, however, that she agreed to the search of the cellar".

We do not agree with the Commonwealth's statement that the actions of the police in securing entry to premises 528 Rhawn Street are unimportant. Of course, the

facts do bear out the Commonwealth's statement that there was no search warrant and that Mrs. Fassnacht denied that she agreed to the search of the cellar.

In connection with the search and seizure of items at 528 Rhawn Street, we made the following conclusions of law: (1) the police had no warrant when they entered and searched that premises; (2) the search of premises and seizure of items contained therein was not incident to a lawful arrest; (3) no valid consent was given by Mrs. Fassnacht to the search of that premises or seizure of the items contained therein.

The Commonwealth virtually concedes these three conclusions but strenuously contends that the search of the defendant's Rhawn Street property was justified on the ground that the police were faced with

the "emergency situation" which presented "exceptional circumstances" justifying the search. We cannot agree with this contention. As stated hereinabove, the police were in possession of certain knowledge at 9 P.M., on the evening of June 19, 1971. By 3 A.M., the following morning they had verified this knowledge by a search of the Large Street property and were in possession of further knowledge concerning certain items in the defendant's Rhawn Street property. Nevertheless, they did not proceed to the Rhawn Street property immediately not did they arrive there until one and a half to two hours later.

Moreover, a great number of police officers were in and out of the Rhawn Street premises from approximately 5 A.M., on June 20, 1971 until all the contents

were removed. The process of removing these contents did not begin until 10 A.M., and was not completed until 7 P.M., that evening. Mrs. Fassnacht herself did not leave the property until sometime in the mid-morning of June 20, 1971. In addition the police spent sometime on the premises examining the contraband and there was even a police photographer at the premises taking photographs of the contraband during this entire period. Under these circumstances it is extremely difficult, to say the least, to come to a conclusion that the police themselves believed an emergency situation existed at 528 Rhawn Street on June 19-20, 1971. On the contrary, we conclude as a matter of law that no such emergency situation existed which would justify a search of these premises.

We concur entirely with Judge Murphy's conclusion on this point.

Therefore, while the search of the 5414 Large Street and seizure therein was proper, the subsequent search of defendant's property at 528 Rhawn Street was constitutionally impermissible and items seized therein must be suppressed.

Accordingly, and for the foregoing reasons, we enter the following:

O R D E R

AND NOW, to wit, this 8th day of November, 1973 the defendant's motion to quash the Commonwealth's appeal from the order of the Municipal Court of Philadelphia dated October 27, 1972 is denied. The Commonwealth's appeal from that order is granted in regard to the search of premises 5414 Large Street, Philadelphia, Pennsylvania and the items seized therein

may be used in evidence at defendant's forthcoming trial. The Commonwealth's appeal to suppress all items found in premises 528 Rhawn Street, Philadelphia, Pennsylvania is denied; those items found therein are hereby suppressed and may not be used in evidence at defendant's forthcoming trial. This matter is remanded to the Municipal Court of Philadelphia for trial in accordance with the foregoing opinion.

BY THE COURT:

/s/ (s) Doty
A.J.

Ethan Allen Doty,
Administrative Judge

Supreme Court, U. S.
FILED
SEP 28 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
NO. 78-191

GEORGE E. FASSNACHT,
PETITIONER

V.

PENNSYLVANIA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Is petitioner's fourth amendment claim cognizable for review by this Court where petitioner failed to present this claim in the State Court forfeiture proceeding or on appeal to the State Appellate Courts and it is raised for the first time in the instant petition for writ of certiorari.

2. Assuming arguendo that petitioner's fourth amendment claim is cognizable, should the fourth amendment exclusionary rule apply to the forfeiture proceeding in the instant case.

3. Was petitioner denied due process of law where there was ample evidence to justify the State Court's refusal to return firearms and ammunition seized from the basement of petitioner's home.

4. Did the Commonwealth adequately demonstrate by a preponderance of the evidence that petitioner was an unlicensed dealer under 18 U.S.C. §921 et seq., 18 U.S.C.A. §921 et seq. (1976).

COUNTER-STATEMENT OF THE CASE

On June 20, 1971, pursuant to a search warrant, officers of the Philadelphia Police Department conducted a search of the home of Miss Marie Tobin, 5414 Large Street, Philadelphia, Pennsylvania. There they seized two boxes containing various weapons which, according to Miss Tobin, belonged to petitioner, George Fassnacht. Miss Tobin also told the officers that petitioner's wife and two friends had removed several boxes the preceding night after Miss Tobin had told petitioner's wife to remove all explosives

FROM HER HOME. ACTING UPON THIS INFORMATION, THE POLICE OFFICERS WENT TO PETITIONER'S HOME AT 528 RHAWN STREET IN PHILADELPHIA WHERE THEY SEIZED FROM THE BASEMENT THE FOLLOWING ARSENAL OF WEAPONRY: AUTOMATIC PISTOLS; MACHINE GUNS; PISTOLS WITH SHOULDER STOCKS; A PISTOL SILENCER; PISTOLS; DESTRUCTIVE DEVICES OR EXPLOSIVES INCLUDING PLASTIC EXPLOSIVES, ELECTRIC SQUIBS, GUNPOWDER, T.NT, HAND GRENADE FUSES, A CHINESE COMMUNIST PROPELLING CHARGE AND A GRENADE SIMULATOR; RIFLES; KNIVES, SWORDS AND A MACHETE; OVER 370,000 ROUNDS OF AMMUNITION; WEAPONS PARTS FOR AUTOMATIC AND NON-AUTOMATIC WEAPONS; AMMUNITION MAGAZINES AND AMMUNITION CLIPS FOR AUTOMATIC AND NON-AUTOMATIC WEAPONS; ITEMS WHICH THE COMMONWEALTH AGREED TO RETURN. SEE INVENTORY ATTACHED HERETO AS APPENDIX "A". THESE ITEMS WHEN DISCOVERED BY POLICE, WERE STORED IN BOXES AND WERE KEPT CLEAN AND OILED. (N.T. 33).[1]

FOUR DAYS AFTER THE DISCOVERY OF THIS ARSENAL, PETITIONER

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1 WHILE DEFENDANT CLAIMS THAT THESE ITEMS WERE PACKED IN GOVERNMENT SUPPLIED BOXES AT GOVERNMENT EXPENSE IN PREPARATION FOR GOVERNMENT ASSIGNMENT OUTSIDE THE UNITED STATES, SEE PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA (HEREINAFTER PETITION) AT 7, THIS ALLEGED FACT IS NOT OF RECORD IN THIS CASE NOR HAS IT BEEN NOTED IN ANY PRIOR BRIEF FILED WITH THE STATE COURTS IN THIS CASE.

WAS ARRESTED AND CHARGED WITH A VARIETY OF WEAPONS OFFENSES. PRIOR TO TRIAL PETITIONER SUCCESSFULLY MOVED TO SUPPRESS ALL WEAPONS SEIZED FROM HIS BASEMENT ON RHAWN STREET AND THE BOXES SEIZED FROM THE LARGE STREET ADDRESS. THE COMMONWEALTH APPEALED THE SUPPRESSION ORDER TO THE COURT OF COMMON PLEAS WHICH AFFIRMED THE SUPPRESSION OF THE ITEMS SEIZED FROM PETITIONER'S BASEMENT BUT REVERSED THE SUPPRESSION ORDER WITH RESPECT TO THE ITEMS SEIZED FROM MS. TOBIN'S BASEMENT ON LARGE STREET. CONSEQUENTLY, PETITIONER'S DEMURRER TO THE CHARGES RELATING TO THE ITEMS IN HIS BASEMENT WAS SUSTAINED. PETITIONER WAS FOUND NOT GUILTY OF THE CHARGES RELATING TO THE ITEMS SEIZED FROM THE LARGE STREET ADDRESS.

ON APRIL 19, 1974, PETITIONER FILED A PETITION IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY SEEKING RETURN OF ALL PROPERTY TAKEN FROM THE BASEMENT OF 528 RHAWN STREET. A HEARING WAS HELD ON JULY 16, 1974, BEFORE THE HONORABLE NED L. HIRSH. THERE THE COMMONWEALTH AND PETITIONER STIPULATED TO THE FOLLOWING EVIDENCE:

FRANK MOYER, FIREARMS SPECIALIST OF THE UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, WOULD HAVE TESTIFIED THAT ON JUNE 20, 1971, HE WAS PRESENT IN THE BASEMENT OF PETITIONER'S RESIDENCE AT 528 RHAWN STREET WHERE HE OBSERVED LARGE QUANTITIES OF EXPLOSIVES AND AMMUNITION NEAR THE BASEMENT FURNACE, AND LOOSE BLACK POWDER ON THE FLOOR WHICH COULD HAVE BEEN IGNITED

BY FRICTION CAUSED BY THE MERE SCUFFING OF FEET ON THE FLOOR'S CONCRETE SURFACE (N.T. 30). MR. MOYER WOULD HAVE STATED THAT IN HIS OPINION THE CONDITION IN WHICH HE FOUND PETITIONER'S BASEMENT WAS EXTREMELY UNSAFE AND THAT IF A FIRE HAD STARTED THEREIN AN EXPLOSION OF SUCH INTENSITY WOULD HAVE OCCURRED THAT IT WOULD HAVE DESTROYED NOT ONLY PETITIONER'S HOME BUT ALSO A PORTION OF THE COMMUNITY (N.T. 30, 31).

MR. MOYER WOULD HAVE ALSO STATED THAT THE QUANTITY AND QUALITY OF THE AMMUNITION FOUND IN PETITIONER'S BASEMENT INDICATED THAT PETITIONER WAS NOT A COLLECTOR OF WEAPONS, AS HE CLAIMS IN THE INSTANT APPEAL, BUT RATHER A FIREARMS DEALER (N.T. 32). MR. MOYER WOULD HAVE TESTIFIED THAT IN HIS EXPERIENCE COLLECTORS DO NOT GENERALLY KEEP MORE THAN ONE THOUSAND ROUNDS OF ANY ONE TYPE OF AMMUNITION ON HAND AND THAT WHEN SUCH A QUANTITY OF AMMUNITION IS KEPT IT IS KEPT FOR A WEAPON THAT IS FIRED OFTEN AND NOT JUST EXHIBITED IN A GUN COLLECTION (N.T. 32). THE PHILADELPHIA POLICE RECOVERED FROM PETITIONER'S BASEMENT OVER THIRTY-FIVE DIFFERENT TYPES OF AMMUNITION IN QUANTITIES OF OVER ONE THOUSAND ROUNDS, FIVE DIFFERENT TYPES IN QUANTITIES OVER TEN THOUSAND ROUNDS, AND ONE TYPE IN A QUANTITY IN EXCESS OF NINETY-FIVE THOUSAND ROUNDS. MOREOVER, MR. MOYER WOULD HAVE TESTIFIED THAT THE MANNER IN WHICH THE WEAPONS WERE STORED IN THE BASEMENT WAS NOT THE MANNER IN WHICH A COLLECTOR WOULD DISPLAY HIS COLLECTION (N.T. 33).

A Mr. Theamides, attorney for the Bureau of Alcohol, Tobacco and Firearms, would have testified that the aforementioned items were not registered at the time of their seizure as required by the National Firearms Act (N.T. 34, 35). 26 U.S.C. §5841 et seq., 26 U.S.C.A. §5841 et seq. (1968). Furthermore, Rosemary Carr of the United States Department of the Treasury, Department of Licenses and Inspections, would have stated that petitioner was not, at the time of the hearing nor at the time of the seizure, licensed by the federal government as a dealer in firearms or ammunition or as a collector thereof (N.T. 12). Sylvia Lewis of the Philadelphia Police Department, employed in the Philadelphia Department of Licenses and Inspections, would have testified that petitioner was not licensed to store ammunition and explosives and was not registered as a collector of those items either on the date of the seizure or on the date of the hearing (N.T. 13, 14).

Finally, Detective Eddie Reagen of the Philadelphia Police Department would have testified that he determined from interviews with petitioner's family that petitioner had been absent from the country for two and one-half years prior to the seizure on June 20, 1971, yet during petitioner's absence

BOXES WERE DELIVERED TO PETITIONER'S HOME AND PLACED IN THE BASEMENT (N.T. 15).

PETITIONER OFFERED THE STATEMENT OF HOWARD MONTGOMERY, A BALLISTICS SPECIALIST FOR THE PHILADELPHIA POLICE DEPARTMENT, WHO WOULD HAVE TESTIFIED THAT DEALERSHIP CANNOT BE PRESUMED FROM THE QUANTITY OF WEAPONS STORED IN PETITIONER'S HOME AND THAT SUCH QUANTITY WAS CONSISTENT WITH PETITIONER'S ASSERTION THAT HE WAS A PRIVATE COLLECTOR (N.T. 48). ADDITIONALLY, PETITIONER WOULD HAVE TESTIFIED THAT HE IS A BALLISTICS EXPERT. THOUGH HE HAD NOT BEEN EMPLOYED IN THAT CAPACITY SINCE JUNE, 1971, HE STILL OFFERED HIS SERVICES AS AN EXPERT AND THE WEAPONS HE HAD IN HIS BASEMENT WERE ESSENTIAL TO HIS WORK AS AN EXPERT (N.T. 46). PETITIONER ALSO WOULD HAVE STATED THAT HE WAS A WEAPONS COLLECTOR AND NEVER ENGAGED IN EITHER WHOLESALE OR RETAIL TRANSACTIONS WITH RESPECT TO THE WEAPONS, EXPLOSIVES, AND AMMUNITION FOUND IN HIS BASEMENT (N.T. 46).

ON JANUARY 6, 1975, JUDGE HIRSH DENIED THE PETITION FOR RETURN OF PROPERTY AND ORDERED THE PROPERTY DESTROYED. ON APPEAL TO THE SUPERIOR COURT OF PENNSYLVANIA, THE ORDER OF THE LOWER COURT WAS AFFIRMED EXCEPT WITH RESPECT TO THE SWORDS, KNIVES AND MACHETE FOR WHICH THE CASE WAS REMANDED FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW. COMMONWEALTH V. FASSNACHT, 246 PA. 42 , 369 A.2D 800 (1977). PETITIONER SOUGHT ALLOWANCE OF APPEAL TO THE SUPREME COURT OF PENNSYLVANIA WHICH DENIED HIS PETITION ON AUGUST 5, 1977. PETITIONER SOUGHT A RECONSIDERATION

OF THAT ORDER WHICH WAS ALSO DENIED. THE INSTANT PETITION FOR A WRIT OF CERTIORARI, REQUESTING RETURN OF ONLY THE PISTOLS, RIFLES AND AMMUNITION, ENSUED.

REASONS FOR DENYING THE WRIT

1. PETITIONER'S FAILURE TO RAISE HIS FOURTH AMENDMENT CLAIM IN THE STATE COURT FORFEITURE PROCEEDING OR IN THE APPEAL THEREFROM PRECLUDES REVIEW OF IT BY THIS COURT.

PETITIONER CLAIMS THAT EVIDENCE OF HIS WEAPONS CACHE, WHICH HAD BEEN SUPPRESSED AT HIS CRIMINAL TRIAL, SHOULD NOT HAVE BEEN USED IN THE HEARING ON HIS APPLICATION FOR RETURN OF PROPERTY. PETITIONER CLAIMS THAT THE COMMONWEALTH'S USE OF THIS SUPPRESSED EVIDENCE VIOLATED HIS FOURTH AMENDMENT RIGHTS UNDER ONE 1958 PLYMOUTH SEDAN V. PENNSYLVANIA, 380 U.S. 693, 85 S. CT. 1246 (1965). HOWEVER, AT THE RETURN OF PROPERTY HEARING, PETITIONER FAILED TO OBJECT TO THE INTRODUCTION OF THIS EVIDENCE ON FOURTH AMENDMENT GROUNDS OR TO RAISE AND ARGUE THE FOURTH AMENDMENT CLAIM IN THE PENNSYLVANIA APPELLATE COURTS. SEE BRIEF FOR APPELLANT IN THE SUPERIOR COURT, NO. 705, OCTOBER TERM, 1975; SEE ALSO COMMONWEALTH V. FASSNACHT, PETITION FOR ALLOWANCE OF APPEAL, ALLOCATUR DOCKET NO. 2962, FILED 5/18/77, DENIED 8/5/77; AND COMMONWALTH V. FASSNACHT, PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR ALLOWANCE OF

APPEAL, FILED 8/22/77, DENIED 4/4/67.[2] WHILE OBJECTIONS ON GROUNDS OF RELEVANCY (N.T. 11, 14, 40-41) AND MATERIALITY (N.T. 14, 20) WERE MADE, NO OBJECTION WAS MADE ON PETITIONER'S NOW ASSERTED CONSTITUTIONAL GROUND. IT IS WELL SETTLED THAT "AN OBJECTION TO EVIDENCE PREDICATED UPON A SPECIFIC CONSTITUTIONAL CLAIM IS NOT PROPERLY PRESENTED FOR REVIEW IF THE ONLY OBJECTION MADE IN THE TRIAL COURT WAS BASED ON OTHER GROUNDS. UNITED STATES V. MILLER, 316 F.2D 81, 84 (6TH CIR. 1963), CERT. DENIED, 375 U.S. 935, 84 S. CT. 335 (1963).

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2 PETITIONER SUGGESTS THAT PROPERTY IS FORFEITABLE ONLY IF IT IS CONTRABAND PER SE, I.E., THE MERE POSSESSION OF IT IS CRIMINAL. THIS IS INCORRECT. ITEMS WHICH ARE USED FOR ILLEGAL PURPOSES, E.G. THE GUN IN A ROBBERY, THE CAR WHICH TRANSPORTS ILLEGAL LIQUOR, GAMBLING MONEY, ARE ALSO FORFEITABLE AS CONTRABAND. THE DIFFERENCE, OF COURSE, IS THAT POSSESSION OF THE LATTER TYPE OF CONTRABAND MUST BE SHOWN TO BE IN VIOLATION OF PUBLIC POLICY BECAUSE OF THE USE TO WHICH IT IS PUT. ONCE THIS IS SHOWN BY A PREPONDERANCE OF THE EVIDENCE. ONE 1961 LINCOLN CONTINENTAL SEDAN V. UNITED STATES, 360 F.2D 467, 469 (8TH CIR. 1966), THE ITEM IS FORFEITED. WHILE THE ADMISSION OF EVIDENCE TO PROVE ILLEGAL USE MAY BE OBJECTED TO ON THE GROUNDS THAT IT WAS ILLEGALLY SEIZED, NO SUCH OBJECTION WAS MADE HERE AND THUS THE USE OF THE EVIDENCE IN THE PROCEEDING BELOW WAS PROPER. MOREOVER, IT IS WELL SETTLED THAT THE MERE FACT OF AN ILLEGAL SEIZURE, STANDING ALONE, DOES NOT IMMUNIZE GOODS, BE THEY PER SE OR DERIVATIVE CONTRABAND, FROM FORFEITURE, UNITED STATES V. ONE 1971 HARLEY DAVIDSON MOTORCYCLE, 508 F.2D 351 (9TH CIR. 1974) QUOTING JOHN BACALL IMPORTS, LTD. V. UNITED STATES, 412 F.2D 586, 588 (9TH CIR. 1969).

Moreover, this Court has indicated that it will not "decide issues raised for the first time here." Tacon v. Arizona, 410 U.S. 351, 352, 93 S. Ct. 998, 999 (1973); Monks v. New Jersey, 398 U.S. 71, 90 S. Ct. 1563 (1970); Street v. New York, 394 U.S. 576, 581-85, 89 S. Ct. 1354 (1969); Pickering v. Board of Education, 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 1740 n.2 (1968). In Tacon v. Arizona, supra, petitioner sought review of his claim regarding the constitutional limits on the State's authority to try a person in absentia. Because this issue was not raised in the state courts, and was raised for the first time in the Petition for writ of certiorari, this Court refused to consider the issue. See also Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1161 (1969). The noncognizable nature of the issue is even more prevalent in the instant case where the claim sought to be reviewed is the suppression of evidence on fourth amendment grounds. For by both federal and state rule, suppression motions on constitutional grounds must be made prior to trial and failure to do so constitutes a waiver. Fed. R. Crim. P. 12(f); Pa. R. Crim. P. 323(b); Jones v. United States, 362 U.S. 257, 80 S. Ct. 725 (1960); United States v. Ellis, 461 F.2d 962, 969 (2d Cir. 1972) cert denied, 409 U.S. 866, 93 S. Ct. 152 (1972); United States v. Lyon, 397 F.2d 505, 508 (7th Cir. 1968) cert. denied sub. nom. Lysczyk v. United States, 393 U.S. 846, 89 S. Ct. 131 (1968). Certainly if a federal litigant is precluded from raising this issue in this Court by failure to raise it in the trial court, a state litigant should not be entitled to more. See Francis v. Henderson, 425 U.S. 536, 544, 96 S. Ct. 1708, 1711, (1976).

Moreover, where as here the nature of the proceeding is civil (in rem) rather than criminal, and, thus, the issue and the remedy involve money or fungible goods rather than liberty, there is simply no reason to permit a litigant, after four years of litigation through all state court levels with extensive time and money expended by the opposing side, suddenly to raise a new issue on petition for certiorari to this Court. To do so would make all prior litigation for nought and would unjustly punish the opposing side which would have needlessly expended much time and money only to have the issue changed at the last moment. Obviously the initial decision to litigate and to bear the cost of litigation is based on the issue which the opposing side raises. Whatever justification there may be for allowing such piecemeal litigation to exist where liberty is at stake simply does not exist, where, as here, personal property rights are at issue.

Finally it should be noted that had this issue been raised for the first time in the Pennsylvania Appellate Courts, it undoubtedly would not have been considered by reason of the failure to raise it in the trial court. Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974). This rule of state court procedure, requiring that an issue must be raised in the

TRIAL COURT IN ORDER TO BE COGNIZABLE ON APPELLATE REVIEW, CONSTITUTES AN ADEQUATE STATE GROUND TO PRECLUDE REVIEW OF THE ISSUE HERE. SEE WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S. CT. 2497 (1977); SEE ALSO CARDINALE V. LOUISIANA, SUPRA, AT 439, 89 S. CT. 1163.

FINALLY, THE APPLICATION OF THE WAIVER DOCTRINE IS PARTICULARLY SOUND IN THE INSTANT CASE IN VIEW OF PETITIONER'S CIVIL REMEDIES INCLUDING STATE AND FEDERAL CIVIL ACTIONS AGAINST THOSE WHO PERFORMED THE ILLEGAL SEIZURE[3] AS WELL AS MALPRACTICE ACTIONS AGAINST THE ATTORNEYS WHO FAILED TO RAISE THE FOURTH AMENDMENT ISSUE IN THE STATE COURTS. SEE HILL V. CALIFORNIA, 401 U.S. 802, 805, 91 S. CT. 1106, 1111 (1971).

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[3] INDEED PETITIONER HAS INSTITUTED BOTH STATE AND FEDERAL PROCEEDINGS AND ALTHOUGH HIS FEDERAL SUIT WAS DISMISSED UNDER THE STATUTE OF LIMITATIONS, HIS STATE ACTION IS STILL PENDING.

EVEN IF THIS COURT WERE TO REACH THE MERITS OF PETITIONER'S FOURTH AMENDMENT CLAIM, THE COMMONWEALTH SUBMITS THAT THE EXCLUSIONARY RULE SHOULD NOT APPLY SO AS TO PRECLUDE THE INTRODUCTION OF EVIDENCE OF PETITIONER'S WEAPON ARSENAL TO PROVE UNLICENSED DEALERSHIP IN THE FORFEITURE PROCEEDING IN THIS CASE.[4] THE PURPOSE BEHIND THE EXCLUSIONARY

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[4] WHILE THE FOURTH AMENDMENT HAS BEEN HELD TO APPLY IN THE FORFEITURE AREA, SEE ONE 1958 PLYMOUTH SEDAN V. PENNSYLVANIA, SUPRA, THE HISTORICAL UNDERPINNINGS OF THIS DECISION REST ON BOYD V. UNITED STATES, 116 U.S. 616, 6 S. CT. 524 (1886) WHICH APPLIED THE FOURTH AMENDMENT ONLY AS TO PERSONAL PAPERS, SEE ALSO SILVERTHORNE LUMBER CO. V. UNITED STATES, 251 U.S. 385, 40 S. CT. 182 (1920), AND SPECIFICALLY EXCLUDED PER SE AND DERIVATIVE CONTRABAND:

> IT IS CLEAR THAT THE MEMBERS OF THAT BODY [THE CONGRESS WHICH ADOPTED THE CONSTITUTION AND ITS AMENDMENTS] DID NOT REGARD SEARCHES AND SEIZURES OF THIS KIND [TO REGULATE COLLECTION OF DUTIES] AS "UNREASONABLE", AND THEY ARE NOT EMBRACED WITHIN THE PROHIBITION OF THE [FOURTH] AMENDMENT. SO, ALSO, THE SUPERVISION AUTHORIZED TO BE EXERCISED BY OFFICERS OF THE REVENUE OVER THE MANUFACTURE OR CUSTODY OF EXCISABLE ARTICLES ... ARE NECESSARILY EXCEPTED OUT OF THE CATEGORY OF UNREASONABLE SEARCHES AND SEIZURES. SO ALSO, THE LAWS WHICH PROVIDE FOR SEARCH AND SEIZURE OF ARTICLES AND THINGS WHICH IT IS UNLAWFUL FOR A PERSON TO HAVE IN HIS POSSESSION FOR THE PURPOSE OF ISSUE OR DISPOSITION SUCH AS COUNTERFEIT COIN, LOTTERY TICKETS, IMPLEMENTS OF GAMBLING, ETC., ARE NOT WITHIN THIS CATEGORY... MANY OTHER THINGS OF THIS CHARACTER MIGHT BE ENUMERATED.

BOYD V. UNITED STATES, SUPRA AT 623-24, 116 U.S. AT 528-29.

RULE IS TO DETER FUTURE ILLEGAL POLICE CONDUCT.[5] UNITED STATES v. CALANDRA, 414 U.S. 338, 347, 94 S. Ct. 613, 619 (1974). RECENTLY, SEVERE LIMITATIONS HAVE BEEN PLACED ON THE USE OF THE EXCLUSIONARY RULE. SEE STONE v. POWELL, 428 U.S. 465, 97 S. Ct. 3037 (1976); UNITED STATES v. JANIS, 428 U.S. 433, 96 S. Ct. 3021 (1976); UNITED STATES v. PELTIER, 422 U.S. 531, 95 S. Ct. 2313 (1975); MICHIGAN v. TUCKER, 417 U.S. 433, 447-48, 94 S. Ct. 2357 (1974); HARRIS v. NEW YORK, 401 U.S. 222, 91 S. Ct. 643 (1971); ALDERMAN v. UNITED STATES, 394 U.S. 165, 89 S. Ct. 961 (1969); WALDER v. UNITED STATES, 347 U.S. 62, 74 S. Ct. 354 (1954); UNITED STATES v. SHIPANI, 435 F.2D 26 (2D CIR. 1970) CERT. DENIED, 401 U.S. 983, 91 S. Ct. 1198 (1971). IN STONE v. POWELL, SUPRA, THIS COURT DISALLOWED IMPLEMENTATION OF THE EXCLUSIONARY RULE BY WAY OF COLLATERAL REVIEW IN FEDERAL HABEAS CORPUS EVEN WHERE THE STATE COURT HAS WRONGLY DECIDED THE FOURTH AMENDMENT ISSUE UNLESS THE PRISONER HAD BEEN DENIED A FAIR REVIEW OF THE FOURTH AMENDMENT CLAIM BY THE STATE COURT. WITH REGARD TO THE EXCLUSIONARY RULE THE COURT QUOTED:

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5 ALTHOUGH "JUDICIAL INTEGRITY" HAS BEEN CONSIDERED AS A PURPOSE BEHIND THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE, SEE UNITED STATES v. PELTIER, 422 U.S. 531, 536-39, 95 S. Ct. 2313, 2317-18 (1975), THIS COURT NO LONGER REGARDS THAT RATIONALE AS A JUSTIFICATION FOR THE EXCLUSIONARY RULE. SEE STONE v. POWELL, 428 U.S. 465 AT 485-86, 96 S. Ct. 3037 AT 3047-48. SEE ALSO, UNITED STATES v. VANDEMARK, 522 F.2D 1019, 1022 (9TH CIR. 1975); PEOPLE v. BELLECI, 81 CAL. APP. 3D 392, 146 CAL. REPTR. 462 (1978).

As Professor Amsterdam has observed:

> "The Rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensibility in exert(ing) general legal pressures to secure obedience to the Fourth Amendment on the part of ... law-enforcing officers. As it serves this function, the rule is a needed, but grud[g]ingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest ...." Search, Seizure and Section 2255: A Comment, 112 U.Pa.L.Rev. 378, 388-389 (1964) (footnotes omitted).

Stone v. Powell, supra at 437 n. 24, 96 S. Ct. at 3049 n. 24.

The application of the exclusionary rule is now determined by balancing the purpose of the "cost to society of losing perfectly competent evidence against the prospect of incrementally enhancing fourth amendment values". United States v. Ceccolini, ___ U.S. ___, 98 S. Ct. 1054, 1064 (1978) (Concurring Op., Burger, C.J.); See also United States v. Calandra, supra at 348-51, 94 S. Ct. at 620-21; People v. Belleci, supra.

THE INSTANT CASE PRESENTS THESE COMPETING INTERESTS. WHILE GENERALLY A CIVIL, IN REM PROCEEDING, THE FORFEITURE HERE COMMENCED AS A MOTION FOR RETURN OF PROPERTY UNDER PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 324. THE RETURN OF PROPERTY MOTION, LIKE FED. R. CRIM. P. 41(E), MAY BE EMPLOYED PRIOR TO OR AFTER A CRIMINAL TRIAL. IN EITHER CASE, IF THE EVIDENCE WAS ILLEGALLY SEIZED, THE POLICE ARE PENALIZED BY SUPPRESSION OF THE EVIDENCE AT THE CRIMINAL TRIAL AND THE PROBABLE CONCOMITANT, LOSS OF THE CASE. ACCORDINGLY, THE PURPOSE OF THE EXCLUSIONARY RULE IS FULLY SATISFIED BY ITS APPLICATION IN THE CRIMINAL PROCEEDINGS. TO THEN APPLY THE RULE AGAIN, IN THE RETURN OF PROPERTY PROCEEDING, SERVES NO ADDITIONAL PURPOSE AT ALL. INDEED, TO EMPLOY THE EXCLUSIONARY RULE AT THE FORFEITURE PROCEEDING AND THEREBY PERMIT THE RETURN OF THE PROPERTY AND POTENTIAL CONTINUATION OF ITS CRIMINAL USE WOULD IMPOSE AN ENORMOUS COST ON SOCIETY WHICH IS WHOLLY OUT OF PROPORTION TO ANY POSSIBLE NEED TO VINDICATE THE FOURTH AMENDMENT RULE. WHERE, AS HERE, EXCLUSION OF EVIDENCE DEMONSTRATING ILLEGAL USE WOULD PERMIT THE PROPERTY TO BE RETURNED TO THE ILLEGAL USER FOR CONTINUED ILLEGAL USE, THE PUBLIC POLICY MUST CLEARLY DICTATE THAT THE EVIDENCE IS NOT TO BE EXCLUDED. THE RISK TO THE GENERAL WELFARE IS TOO GREAT - CONTINUATION OF THE CRIME. ACCORDINGLY, WHILE A COURT MAY, INDEED MUST, IN A CRIMINAL PROSECUTION, SUPPRESS EVIDENCE AND THUS PRECLUDE IMPOSITION OF

A CRIMINAL SANCTION UPON AN INDIVIDUAL DESPITE GREAT RISK TO THE GENERAL PUBLIC, NO ADDITIONAL PENALTY SHOULD OR NEED BE EXACTED TO VINDICATE AN INDIVIDUAL'S FOURTH AMENDMENT RIGHTS. APPLICATION OF THE EXCLUSIONARY RULE TO FORFEITURE PROCEEDINGS IS SIMPLY JUDICIAL OVERKILL.

IF IT IS NEVERTHELESS DETERMINED THAT THE EXCLUSIONARY RULE IS NECESSARY IN THE FORFEITURE AREA BECAUSE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE IN THE CRIMINAL TRIAL IS INSUFFICIENT TO DETER ILLEGAL POLICE CONDUCT AND PROTECT FOURTH AMENDMENT VALUES, THEN ITS APPLICATION IN THE FORFEITURE AREA SHOULD BE LIMITED TO CASES INVOLVING BAD FAITH ON THE PART OF THE POLICE. WHILE RETENTION OF A PER SE EXCLUSION IN CRIMINAL TRIALS MAY BE JUSTIFIED, EXTENSION OF SUCH A BLANKET EXCLUSIONARY RULE IN THE FORFEITURE AREA SERVES NO PURPOSE, ESPECIALLY WHERE, AS HERE, THE POLICE HAVE ALREADY SUFFERED LOSS OF THE CRIMINAL CASE, AND THE FOURTH AMENDMENT VIOLATION IS NOT A LACK OF PROBABLE CAUSE, BUT RATHER A MORE TECHNICAL ERROR REGARDING THE WARRANT REQUIREMENT.[6]

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[6] HERE, BASED UPON INFORMATION FROM AN EXTERMINATOR, THE POLICE SECURED A WARRANT FOR MS. TOBIN'S BASEMENT ON LARGE STREET. THERE THE POLICE RECEIVED INFORMATION FROM MS. TOBIN REGARDING EXPLOSIVES WHICH HAD BEEN TRANSFERRED BACK TO PETITIONER'S HOME ON RHAWN STREET. BELIEVING THAT AN EMERGENCY EXISTED IN VIEW OF THE EXPLOSIVES, THE POLICE WENT DIRECTLY TO RHAWN STREET TO SEIZE THESE DANGEROUS ITEMS. DESPITE EVIDENCE THAT A LARGE EXPLOSION COULD EASILY OCCUR (N.T. 30-32) THE POLICE NEVERTHELESS DELAYED BEFORE REMOVING THE ITEMS FROM THE PETITIONER'S BASEMENT. THE ONLY FOURTH AMENDMENT QUESTION PRESENTED BY THAT SEIZURE WAS WHETHER SUFFICIENT EVIDENCE OF AN EMERGENCY EXISTED TO OBVIATE THE WARRANT REQUIREMENT IN VIEW OF THE POLICE DELAY IN EFFECTUATING THE SEIZURE. THERE WAS NEVER SERIOUS DOUBT AS TO THE EXISTENCE OF PROBABLE CAUSE.

SINCE REASONABLENESS IS, AND SHOULD BE, THE TEST OF POLICE CONDUCT UNDER THE FOURTH AMENDMENT, SEE PENNSYLVANIA V. MIMMS, 434 U.S. 106, 98 S. CT. 330 (1977), INTERJECTION OF A GOOD FAITH REQUIREMENT WITH THE EXCLUSIONARY RULE, IF THE EXCLUSIONARY RULE IS NEEDED AT ALL, IS NOT ONLY JUSTIFIED, BUT PROPER. THIS IS ESPECIALLY TRUE AT THIS JUNCTURE, WHEN FEW LAWYERS, MUCH LESS POLICE OFFICERS, CAN TRULY CLAIM FULL EXPERTISE IN THE BURGEONING LAW OF SEARCH AND SEIZURE.

2. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW.

PETITIONER CONTENDS THAT HE WAS DENIED DUE PROCESS BY THE ALLEGED FAILURE OF THE COMMONWEALTH TO PRESENT ANY EVIDENCE OF UNLICENSED DEALERSHIP TO JUSTIFY THE FORFEITURE OF THE RIFLES, PISTOLS,AND AMMUNITION SEIZED FROM THE BASEMENT OF HIS HOME. WHILE THE FAILURE TO PRODUCE ANY EVIDENCE WHATEVER MAY CONSTITUTE A DUE PROCESS VIOLATION, (SEE THOMPSON V. LOUISVILLE, 362 U.S. 199, 80 S. CT. 624 (1960)), WHERE SOME EVIDENCE IS PRESENTED THE CLAIM IS ONE OF SUFFICIENCY OF THE EVIDENCE WHICH IS NOT A CONSTITUTIONAL MATTER AND ACCORDINGLY NOT COGNIZABLE ON CERTIORARI REVIEW. 28 U.S.C. §1257(c), 28 U.S.C.A. §1257(c)(1966). SEE ALSO ANDERSON V. MAGGIO, 555 F.2D 447, 452 (5TH CIR. 1977); TALAVERA V. WAINWRIGHT, 547 F.2D 1238 (5TH CIR. 1977). THE GRAVAMEN OF PETITIONER'S CLAIM IS THAT LACK OF EVIDENCE OF A TRANSACTION CONSTITUTES

"NO EVIDENCE" AND THAT THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE COMMONWEALTH PROVED NOTHING. THE COMMONWEALTH SUBMITS THAT ALTHOUGH THE EVIDENCE WAS CIRCUMSTANTIAL, IT WAS MORE THAN SUFFICIENT TO SUPPORT A FINDING THAT PETITIONER WAS AN UNLICENSED DEALER IN FIREARMS AND AMMUNITION IN VIOLATION OF BOTH THE FEDERAL GUN CONTROL ACT, 18 U.S.C. §921, ET SEQ., 18 U.S.C.A. §921 ET SEQ. (1976) AND THE PENNSYLVANIA CRIMES CODE, 18 C.P.S.A. §6112 (1973).[7]

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[7] THE PROOF PRESENTED WOULD ALSO ESTABLISH VIOLATIONS OF THE REGISTRY PROVISIONS OF THE NATIONAL FIREARMS ACT, 26 U.S.C. §5841 ET SEQ., 26 U.S.C.A. §5841 ET SEQ. (SUPP. 1978). BECAUSE THE PENNSYLVANIA SUPERIOR COURT ADDRESSED ONLY PROOF OF UNLICENSED DEALERSHIP UNDER THE GUN CONTROL ACT, HOWEVER, SUFFICIENCY UNDER THE GUN CONTROL ACT ONLY IS ADDRESSED HERE.

Moreover it has never been held that proof by circumstantial evidence constitutes a violation of due process. Further, unlicensed dealership may be established by circumstantial evidence alone. See United States v. Ransom, 545 F.2d 481 (5th Cir. 1977), cert. denied, ___ U.S. ___, 98 S. Ct. 310 (1977); United States v. Assortment of 12 Rifles and 21 Handguns, 313 F. Supp. 641 (M.D. Fla. 1970).

The record establishes the petitioner was not licensed as a dealer or collector in firearms, ammunition, or explosives under state or federal law at the time of the seizure. (N.T. 12, 14). Indeed petitioner does not contest this fact. The record also establishes that petitioner's basement was a virtual arsenal of weaponry, including inter alia, over 100 rifles, 19 pistols, over 370,000 rounds of ammunition, vast quantities of machine guns, automatic pistols, destructive devices or ~~detail~~ explosives including electric squibs, gunpowder, TNT, hand grenade fuses, a Chinese Communist Propelling Charge and a Grenade simulator, weapons parts, firecrackers, knives, swords and a machete. (See Inventory, Appendix "A", N.T. 8-9). Stipulated expert testimony revealed that this quantity of weaponry, as well as the manner in which it was stored, packed rather than displayed, demonstrated that petitioner was dealing in firearms, ammunition and explosives rather than merely collecting. The stipulated testimony established that a collector would not possess more than a thousand

ROUNDS OF ANY TYPE OF AMMUNITION. (N.T. 32). HERE, AMONG THE 370,000 ROUNDS OF AMMUNITION PETITIONER HAD 35 TYPES OF AMMUNITION IN QUANTITIES EXCEEDING 1000 ROUNDS, 5 TYPES OF AMMUNITION EXCEEDING 10,000 ROUNDS, AND 95,349 LIVE ROUNDS OF 7.5 MM FRENCH AMMUNITION. SEE INVENTORY, APPENDIX "A", 20-23. THE COURT COULD INFER FROM THE EVIDENCE THAT THE MANNER OF STORAGE OF THE ITEMS MAKING THEM INACCESSIBLE FOR USE OR SHOW YET APPROPRIATE FOR EXPORT SHIPMENT INDICATES A DEALER RATHER THAN A COLLECTOR.[8] WHILE PETITIONER CLAIMS THAT NO DEALING COULD OCCUR BECAUSE HE WAS OUT OF THE COUNTRY FOR TWO YEARS PRIOR TO THE SEIZURE, IT IS JUST AS LIKELY THAT IN VIEW OF THE PACKAGING, PETITIONER COULD, WHILE ABROAD, ARRANGE FOR SALE AND SHIPMENT OF THESE ITEMS WHICH WOULD BE AVAILABLE FOR OVERSEAS SHIPMENT WITH A PHONE CALL. FURTHERMORE, PETITIONER CANNOT, SIMPLY BY LIMITING HIS REQUEST TO THE RIFLES, PISTOLS, AND AMMUNITION, DISREGARD THE CRUCIAL FACT THAT THESE ITEMS WERE STORED AMONG PER SE CONTRABAND, ESPECIALLY VAST QUANTITIES OF EXPLOSIVES, WHICH COULD NOT POSSIBLY BE KEPT FOR PETITIONER'S "USE". IN VIEW OF THE DANGEROUSNESS OF THE EXPLOSIVES,

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[8] WHILE THERE WAS NO DIRECT TESTIMONY OF PACKING FOR SHIPMENT, PETITIONER IN HIS BRIEF IN THE SUPERIOR COURT OF PENNSYLVANIA, CONCEDED, AND INDEED CLAIMED, THAT THE FIREARMS WERE PACKED "IN EXPORT QUALITY PACKING FOR PROTECTION IN STORAGE AND IN PREPARATION FOR SHIPMENT OVERSEAS". BRIEF FOR APPELLANT, COMMONWEALTH V. FASSNACHT, OCTOBER TERM, NO. 705, SUPERIOR COURT OF PENNSYLVANIA, AT 25.

(N.T. 30-32), NO REASONABLE MAN WOULD POSSESS SUCH MATERIALS IN SUCH QUANTITIES UNLESS HE WERE DEALING IN THEM. HAD THE POLICE SEIZED RIFLES IN A DISPLAY CASE IN PETITIONER'S LIVING ROOM ALONG WITH EXPLOSIVES IN THE BASEMENT, THE COMMONWEALTH WOULD NOT SUGGEST THAT PETITIONER WAS DEALING IN THOSE RIFLES. HERE, HOWEVER, THE RIFLES, PISTOLS AND AMMUNITION WERE PACKED IN THE BASEMENT AMONG THE REMAINING ARSENAL OF WAR EQUIPMENT AND THE ONLY LOGICAL INFERENCE FROM THE COMMINGLED STORAGE IS THAT PETITIONER WAS DEALING IN THE RIFLES, PISTOLS,AND AMMUNITION AS WELL.

FINALLY, IN VIEW OF THE DUPLICATES IN THE COLLECTION, THE COURT COULD INFER THAT THE WEAPONRY FOUND REPRESENTED UNSOLD INVENTORY IN PETITIONER'S UNLICENSED DEALERSHIP.[9] FOR EXAMPLE, THE CACHE CONTAINED FOUR 9 MM GERMAN LUGERS, TWO 7.62 CALIBER RUSSIAN REVOLVERS, SIX 7 MM CALIBER MAUSER RIFLES, TWO 45-70 CALIBER SPRINGFIELD RIFLES, THREE 7.5 MM CALIBER FRENCH RIFLES,

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[9] PETITIONER CLAIMS THAT NO DUPLICATES EXISTED IN HIS COLLECTION AND THAT THE ONLY EVIDENCE OF DUPLICATION FIRST APPEARED IN THE COMMONWEALTH'S APPELLATE BRIEF IN THE SUPERIOR COURT OF PENNSYLVANIA. SINCE, HOWEVER, PETITIONER MADE NO OBJECTION TO THE INVENTORY PRODUCED AT THE HEARING (N.T. 30), AND INDEED STIPULATED TO IT (N.T. 8-9, 41) NOT ONLY IS THERE SUFFICIENT EVIDENCE OF DUPLICATION, BUT PETITIONER'S PRESENT CLAIM OF NO DUPLICATION IS NOT OF RECORD AND IS IN FACT REFUTED THEREBY.

FIVE 8 MM GERMAN RIFLES, FIVE 30 CALIBER U.S. CARBINES AND SIX 30 CALIBER MAUSER AUTOMATIC PISTOLS. THOUGH PETITIONER CLAIMS THAT THE INVENTORY PRESENTED AT TRIAL AND STIPULATED TO BY PETITIONER AT TRIAL (N.T. 8-9, 30, 41), INCORRECTLY LISTS AS DUPLICATES, WEAPONS WHICH PETITIONER "RECALLS" ARE ACTUALLY DIFFERENT, IF PETITIONER WISHED TO EXPLAIN OR EMBELLISH THE INVENTORY, HE HAD AMPLE OPPORTUNITY TO DO SO AT THE HEARING. INDEED FOR THIS COURT TO GRANT CERTIORARI BECAUSE THE PENNSYLVANIA SUPERIOR COURT INCORRECTLY CONSIDERED DUPLICATES COULD ONLY BE PREDICATED ON THIS COURT'S ASSUMING ORIGINAL JURISDICTION IN THIS MATTER.

IN VIEW OF THE EXTENSIVE EVIDENCE REGARDING THE TYPE AND QUANTITY OF WEAPONS, THE MANNER OF STORAGE, THE EXPERT OPINION THAT THESE FACTS ARE INDICATIVE OF A DEALER RATHER THAN A COLLECTOR, AMPLE EVIDENCE OF DEALERSHIP WAS PRESENTED AND NO DUE PROCESS VIOLATION OCCURRED.[10]

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[10] IN HIS ARGUMENT PETITIONER CONFUSES A JUSTIFIABLE INFERENCE FROM THE EVIDENCE WITH A STATUTORY PRESUMPTION. SEE PETITION AT 48 CITING THOMPSON V. LOUISVILLE, SUPRA; TOT V. UNITED STATES, 319 U.S. 463, 63 S. CT. 1241 (1943); AND TURNER V. UNITED STATES, 396 U.S. 398, 90 S. CT. 642, (1970). HERE THERE IS NO PRESUMPTION, MERELY A JUSTIFIABLE INFERENCE FROM CIRCUMSTANTIAL EVIDENCE. CIRCUMSTANTIAL EVIDENCE MAY BE USED TO ESTABLISH UNLICENSED DEALERSHIP. UNITED STATES V. RANSOM, SUPRA; UNITED STATES V. ASSORTMENT OF 12 RIFLES AND 21 HANDGUNS, SUPRA.

PETITIONER ALSO ARGUES THAT HE WAS DENIED DUE PROCESS BY REASON OF THE STIPULATION METHOD OF EVIDENCE PRESENTATION AT THE HEARING, WHERE THE STIPULATIONS WERE, IN PART, CONTRADICTORY. HOWEVER, SINCE THIS CLAIM WAS NEVER RAISED IN THE STATE COURTS, AND INDEED COUNSEL FOR PETITIONER PARTICIPATED IN THIS PROCEDURE AT THE HEARING, PETITIONER CANNOT NOW BE HEARD TO COMPLAIN. MONKS V. NEW JERSEY, SUPRA; STREET V. NEW YORK, SUPRA; PICKERING V. BOARD OF EDUCATION, SUPRA.

EVEN IF THIS ISSUE HAD BEEN PRESENTED TO THE STATE COURTS, IT WOULD NOT MERIT REVIEW HERE. THE STIPULATIONS ENTERED IN THIS CASE, WERE NOT STIPULATIONS AS TO FACTS, BUT RATHER WERE STIPULATIONS AS TO WHAT AN INDIVIDUAL WOULD SAY IF HE OR SHE WERE CALLED AS A WITNESS. THUS THE FACTFINDER COULD STILL MAKE INFERENCES FROM THE STIPULATIONS. MOREOVER, THE STIPULATIONS, WHILE CONFLICTING, WERE NOT DIRECTLY CONTRADICTORY. PETITIONER'S EVIDENCE WAS, IN ESSENCE, THAT HE "NEVER ENGAGED IN TRANSACTIONS, WHOLESALE OR RETAIL WITH THESE ITEMS." (N.T. 46). THE COMMONWEALTH WOULD AGREE THAT SINCE HE STILL POSSESSED THESE ITEMS ON THE DATE OF THE SEIZURE, HE PROBABLY HAD NOT ACTUALLY CONSUMMATED ANY TRANSACTION WITH RESPECT TO THESE PARTICULAR ITEMS AT THAT PARTICULAR TIME. BUT THESE ITEMS PROVIDED SUFFICIENT BASIS TO INFER DEALERSHIP IN ARMS WITH RESPECT TO OTHER ITEMS WHICH COULD HAVE ALREADY BEEN SOLD, OR WITH RESPECT TO THESE ITEMS

AT SOME FUTURE TIME. ACCORDINGLY, THESE ITEMS REPRESENTED UNSOLD INVENTORY IN PETITIONER'S UNLICENSED DEALERSHIP AND THUS WERE CONTRABAND.

3. DEALERSHIP UNDER THE FEDERAL GUN CONTROL ACT WAS ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE.

PETITIONER IN HIS FINAL CONTENTION ARGUES THAT THE STATE COURT ERRED IN DETERMINING THE AMOUNT OF EVIDENCE REQUIRED TO PROVE UNLICENSED DEALERSHIP UNDER THE FEDERAL GUN CONTROL ACT, 18 U.S.C. §922(A)(1), 18 U.S.C.A. §922 (A)(1)(1976). HOWEVER, IN SUPPORT OF HIS ARGUMENT THAT THE QUANTUM OF PROOF REQUIRED IS GREATER THAN THAT FOUND TO BE SUFFICIENT BY THE SUPERIOR COURT, PETITIONER REFERS TO CRIMINAL CASES ONLY. SINCE THIS IS A FORFEITURE PROCEEDING, THE "BEYOND A REASONABLE DOUBT" STANDARD APPLICABLE IN CRIMINAL CASES DOES NOT APPLY. RATHER:

> THIS ACTION, BEING ONE CIVIL IN NATURE, IS GOVERNED BY A STANDARD ALTOGETHER DIFFERENT FROM THAT GOVERNING A CRIMINAL PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTIONS 923 AND 924(A). SEE UNITED STATES V. BURCH, 294 F.2D 1 (5TH CIR. 1961). THUS, THE MEASURE OF PROOF TO SUSTAIN THE POSITION OF THE GOVERNMENT IN THIS TYPE CASE IS BY A PREPONDERANCE OF THE EVIDENCE. SEE UNITED STATES V. UNITED STATES CURRENCY, 264 F. SUPP. 394 (M.D.PA. 1966).

United States v. Assortment of 12 Rifles and 21 Handguns, supra, at 642. See also Glup v. United States, 523 F.2d 557, 561 (8th Cir. 1975) quoting One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235, 93 S. Ct. 489, 492 (1972); One 1961 Lincoln Continental Sedan v. United States, supra. The evidence here, specifically the enormous quantity of items amounting to an arsenal of weaponry, the manner in which they were kept, specifically cleaned, oiled and packed, the nature of all the items, including duplicates and various types of explosives and ammunition, and the virtual impossibility that they could all be used by one person for personal use proved dealership by a preponderance of the evidence. Further, no case has required evidence of a transaction to prove dealership. Even if several isolated single weapon sales would not be sufficient to establish dealership even under a reasonable doubt standard, an enormous cache of stored weapons, explosives and ammunition is enough to prove dealership by a preponderance of the evidence.

Finally, it should be noted that the forfeiture in this case is supportable under various theories including violations of state dealership statutes. Should this Court consider that the evidence, even under a preponderance standard, was insufficient to prove dealership under the Federal Gun Control Act, it would nevertheless be sufficient to support unlicensed dealership by a preponderance of the evidence under state statutes. 18 C.P.S.A. §6112; and for this reason as well review by this Court should not be granted.

CONCLUSION

FOR THE FOREGOING REASONS, RESPONDENT, THE COMMONWEALTH OF PENNSYLVANIA, RESPECTFULLY REQUESTS THAT THE COURT NOT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

JANE CUTLER GREENSPAN
ASSISTANT DISTRICT ATTORNEY

STEVEN H. GOLDBLATT
DEPUTY DISTRICT ATTORNEY FOR LAW

EDWARD G. RENDELL
DISTRICT ATTORNEY

2400 CENTRE SQUARE WEST
PHILADELPHIA, PENNSYLVANIA 19102

APPENDIX A

The following is an inventory of items seized from the premises of George E. Fassnacht, located at 528 Rhawn Street.

Category 1 - automatic weapons, machine guns and automatic pistols:

1 Star Automatic Pistol, 9mm caliber,
Serial No. 560108

1 Astra Automatic Pistol, 9mm caliber,
Serial No. 36406

1 Browning Automatic Pistol, 9 mm caliber,
Serial No. 74521

1 Star Automatic Pistol, 9 mm caliber,
Serial No. B487753

1 Star Automatic Pistol, 380 caliber,
Serial No. S438480

1 Star Automatic Pistol, 45 caliber,
Serial No. P331882

1 Mauser Automatic Pistol, 32 caliber auto,
Serial No. 960638

1 Walther Automatic Pistol, 32 caliber,
Serial No. 54224

1 Hungarian Automatic Pistol, 9mm caliber,
Serial No. EO9768

1 Swedish Automatic Pistol, 9 mm caliber,
Serial No. D14960

1 Czech. Automatic Pistol, 9mm caliber,
Serial No. D07421

1 Spanish Automatic Pistol, 32 caliber,
Serial No. A5597

1 Colt Automatic Pistol, 22 caliber,
Serial No. 154352

1 Styer Automatic Pistol, 9mm caliber,
Serial No. 6248V

1 Polish Automatic Pistol, 9mm caliber,
Serial No. N9722

1 Czech. Automatic Pistol, 9mm caliber,
Serial No. 283922

1 Browning Automatic Pistol, 380 caliber,
Serial No. 49006

1 German Automatic Pistol, 32 caliber,
Serial No. 507209

1 German Automatic Pistol, 32 caliber,
Serial No. 121312

1 Astra Automatic Pistol, 380 caliber,
Serial No. 729446

1 Sauer Automatic Pistol, 32 caliber,
Serial No. 472607

1 Browning Automatic Pistol, 9mm caliber,
Serial No. 127233

1 Mauser Automatic Pistol, 32 caliber,
Serial No. 130673

1 Colt Automatic Pistol, 45 caliber,
Serial No. 40005-LW

1 Manlicher Automatic Pistol, 8mm caliber,
Serial No. 2940

1 Star Automatic Pistol, 380 caliber,
Serial No. S442280

1 Walther Automatic Pistol, 32 caliber,
Serial No. 518434

1 Astra Automatic Pistol, 9mm caliber,
Serial No. 81552

1 Astra Automatic Pistol, 9mm caliber,
Serial No. 81510

1 French Automatic Pistol, 9mm caliber,
Serial No. 555082

1 Colt Automatic Pistol, 22 caliber,
Serial No. 138537S

1 French Automatic Pistol, 7.65 caliber,
Serial No. 87138A

1 Bergman-Bayard Automatic Pistol, 9mm caliber,
Serial No. 5473 (631)

1 Astra Automatic Pistol, 9mm caliber,
Serial No. 6703

1 Colt Automatic Pistol, 380 caliber,
Serial No. 135259

1 Argentine Automatic Pistol, 45 caliber,
Serial No. B5181

1 Japanese Automatic Pistol, 8mm caliber,
Serial No. 16842

1 United States Automatic Pistol, 45 caliber,
Serial No. 1008772

1 Browning Automatic Pistol, 380 caliber,
Serial No. 55729

1 Hungarian Automatic Pistol, 32 caliber,
Serial No. 63020

1 Belgian Automatic Pistol, 32 caliber,
Serial No. 549141

1 Walther Automatic Pistol, 32 caliber,
Serial No. 993193

1 Russian Automatic Pistol, 7.62mm caliber,
Serial No. YN155

1 Astra Automatic Pistol, 32 caliber,
Serial No. 7813

1 Browning Automatic Pistol, 32 caliber,
Serial No. 31600

1 Spanish Automatic Pistol, 32 caliber,
Serial No. 101346

1 Spanish Automatic Pistol, 32 caliber,
Serial No. 5289

1 Argentine Automatic Pistol, 45 caliber,
Serial No. 43409

1 Astra Automatic Pistol, 30 caliber,
Serial No. 12726

1 Mauser Automatic Pistol, 30 caliber,
Serial No. 22001

Category 2 - pistols with shoulder stocks:

1 Mauser Automatic Pistol, 30 caliber,
Serial No. 34311

1 Mauser Automatic Pistol, 30 caliber,
Serial No. 20440

1 Mauser Automatic Pistol, 30 caliber,
Serial No. 851560

1 German Luger, 9mm caliber,
Serial No. 8170

1 Mauser Automatic Pistol, 30 caliber,
Serial No. 425135

1 Mauser Automatic Pistol, 30 caliber,
Serial No. 376513

Category 3 - silencer for pistol:

1 silencer for 22 caliber pistol

Category 4 - pistols:

1 U.S. Military Revolver, 38 Special caliber,
Serial No. V675741

1 Harrington and Richardson Revolver, 22 caliber,
Serial No. 84456

1 Japanese Military Pistol, 8mm caliber,
Serial No. 49815

1 Japanese Tower Pistol, 50 caliber,
No Serial No. listed

1 German Luger, 9mm caliber,
Serial No. 108

1 French Revolver, 8mm caliber,
Serial No. F15107

1 Smith and Wesson Revolver, 38 Special caliber,
Serial No. 20082

1 Spanish Revolver, 25 caliber,
Serial No. 20630

1 German Luger, 9mm caliber,
Serial No. 6456

1 German Luger, 9mm caliber,
Serial No. 4434

1 Sedgley Revolver, 22 caliber,
No Serial No. listed

1 Japanese Tower Pistol, 50 caliber,
No Serial No. listed

1 British Revolver, 455 caliber,
Serial No. 321619

1 Russian Revolver, 7.62 caliber,
Serial No. 27290

1 Russian Revolver, 7.62 caliber,
Serial No. 39319

1 Colt Revolver, 45 caliber,
Serial No. 806236

1 Smith and Wesson Revolver, 38 Special caliber,
Serial No. V507917

1 Swiss Revolver, 7mm caliber,
Serial No. 12455

1 Japanese Revolver, 7mm caliber,
Serial No. 21591

Category 5 - destructive devices or explosives (plastic explosives, electric squibs, gun powder, TNT, hand grenade fuses, a Chinese Communist propelling charge, and a grenade simulator):

1 Flare Pistol, Serial No. 25484

1 Flare Pistol, Serial No. Omitted

1 MBA Gyrojet Pistol, Serial No. B074

The following lots are included under this classification:

Lot No. 29

a) Two metal cases containing 54 blocks (2 and 1/2 pounds each) of C-4 military plastic explosives;

b) One case of electric squibs dated May 19, 1954;

c) Eleven cans of black powder;

d) Two Chinese Communist stick grenades (inert);

e) Two German rockets, RBG 2 & 7 (inert);

f) Three one-half pound blocks of TNT;

g) One pound block of TNT in black case (simulated trigger device).

Note: All items in Lot 29 taken by Army Ordinance.

Lot No. 30

a) One cardboard carton of thirty fuses for hand grenades, spoom type, M-206 A1.

Lot No. 35

a) One wooden box containing fourteen pounds of black powder in cans;

b) One wooden case of thirty green star parachute flares, M19A1;

c) One training grenade.

Note: All items in Lot 35 taken by Army Ordinance.

Lot No. 37

a) One gray canister for smoke pot;

b) One blasting machine.

Note: All items in Lot 37 taken by Army Ordinance.

Lot No. 42

a) Chinese Communist anti-tank grenades, hand thrown, bottoms;

b) One Chinese Communist grenade (inert);

c) One Chinese Communist rocket motor, PG 7;

d) One Warhead (inert);

e) One H.E. anti-tank and eleven anti-tank with propellant handles (inert).

Note: All items in Lot 42 taken by Army Ordinance.

Lot No. 45

a) Two cardboard boxes containing grenade launchers and empty magazines.

Lot No. 46

a) One cardboard box containing grenade launchers.

Lot No. 48

a) Two boxes of fuse lighters (M-2);

b) Three booby-trap simulators;

c) Two M119 booby-trap sinulators;

d) One M116 grenade simulator;

e) Six smoke grenades (M-18), Lot No. PB-5458-10;

f) Three M-23A1 rifle smoke grenades, Lot No. OAP-12-30;

g) Six MK2 MOD1 parachute smoke grenade signals, Lot No. AP 100 9A52;

h) One rifle grenade, M-9A1 AT 6-51.

Note: All items in Lot 48 taken by Army Ordinance.

Category 6 - rifles:

1 Remington Rifle with Scope, 300 caliber,
Serial No. 292486

1 Mauser Rifle, 9X57 caliber,
Serial No. 116571

1 U.S. Carbine, 30 caliber,
Serial No. 3658992

1 Argentine Rifle, 8mm caliber,
Serial No. E1224

1 Czech. Rifle, caliber unknown,
Serial No. 37418

1 U.S. Military Rifle with Scope, 30 caliber,
Serial No. 5791076

1 German Rifle, 7mm caliber,
Serial No. 364

1 Japanese Rifle, 7.7 caliber,
Serial No. 1827529

1 Mossberg Rifle, 22 caliber,
No Serial No.

1 Japanese Tower Rifle, 50 caliber,
No Serial No.

1 Italian Shotgun, 410 gauge,
Serial No. 1565

1 Italian Rifle, 7.5 caliber,
Serial No. NC2376

1 Italian Rifle, 6.5 caliber,
Serial No. 98633

1 Columbian Rifle, 30 caliber,
Serial No. 52358

1 Springfield Rifle, 45-70 caliber,
Serial No. 533940

1 Springfield Rifle, 45-70 caliber,
Serial No. ???346

1 Mauser Rifle, 7mm caliber,
Serial No. H16

1 Mauser Rifle, 7mm caliber,
Serial No. C2438

1 U.S. Carbine, 30 caliber,
Serial No. 2976388

1 Mauser Rifle, 7mm caliber,
Serial No. RF00518

1 Russian Rifle, 7mm caliber,
Serial No. 0R4310

1 Swedish Rifle, 9mm caliber,
Serial No. 126892

1 French Rifle, 8mm caliber,
Serial No. H86904

1 Mauser Rifle, 8mm caliber,
Serial No. 1799

1 Spanish Rifle, 38 caliber ACP,
Serial No. 43932

1 Mauser Rifle, 7mm caliber,
Serial No. 116032

1 U.S. Carbine, 30 caliber,
Serial No. 5510584

1 Winchester Rifle, 45-70 caliber,
Serial No. 19010

1 U.S. Carbine, 30 caliber,
Serial No. 734107

1 U.S. Carbine, 30 caliber,
Serial No. F22211

1 French Rifle, 8mm caliber,
Serial No. R10603

1 Mauser Rifle, caliber unknown,
Serial No. 5273

1 German Rifle, 8mm caliber,
Serial No. 1086D

1 Mauser Rifle, 7mm caliber,
Serial No. C2491

1 U.S. Military Rifle, 30 caliber,
Serial No. 2678259

1 Enfield Rifle, 30 caliber,
Serial No. 131923

1 Italian Rifle, 7.5 caliber,
Serial No. 7208

1 Italian Rifle, 8mm caliber,
Serial No. 110441

1 German Rifle, 8mm caliber,
Serial No. 900

1 Belgian Mauser Rifle, 8mm caliber,
Serial No. 11325

1 German Rifle, 8mm caliber,
Serial No. 997

1 French Rifle, 7.5 caliber,
Serial No. F8308

1 German Rifle, 8mm caliber,
Serial No. 945

1 Portugese Rifle, 8mm caliber,
Serial No. D829

1 Mannlicher Rifle, 8mm caliber,
Serial No. 1157

1 Spanish Rifle, 8mm caliber,
Serial No. K648

1 U.S. Carbine, 30 caliber,
Serial No. 6429684

1 Mauser Rifle, 8mm caliber,
Serial No. 9323

1 Spandau Rifle, 10.5mm caliber,
Serial No. 9063

1 French Rifle, 7.5mm caliber,
Serial No. 98597

1 Spanish Rifle, 9mm caliber,
Serial No. 44351

1 Mauser Rifle, 7.9mm caliber,
Serial No. unknown

1 French Rifle, 10mm caliber,
Serial No. 751

1 Russian Rifle, 7.62mm caliber,
Serial No. 60U9115

1 Belgian Mauser Rifle, 7mm caliber,
Serial No. 39187

1 Russian Rifle, 7.62 caliber,
Serial No. 1000

1 French Rifle, 7.5mm caliber,
Serial No. F23989

1 Spanish Rifle, 7.62mm caliber,
Serial No. S02352

1 Egyptian Rifle, 7mm caliber,
Serial No. 1942-2064

1 German Rifle, 7.62mm caliber,
Serial No. NB712

1 Belgian Rifle, 7.62mm caliber,
Serial No. 6275

1 Belgian Rifle, 308 caliber,
Serial No. 2007

1 Iranian Rifle, 8mm caliber,
No Serial No.

1 German Rifle, 8mm caliber,
Serial No. 7077

1 Mannlicher Rifle, 8mm caliber,
Serial No. RA30717

1 Mauser Rifle, 22 caliber,
Serial No. 141497

1 Japanese Rifle, 7.7mm caliber,
Serial No. 98291

1 Belgian Rifle, 7.62 caliber,
Serial No. 1456

1 Iranian Rifle, 7.9mm caliber,
Serial No. not listed

1 Mauser Rifle, 7.9mm caliber,
Serial No. 011688

1 Mauser Rifle, 8mm caliber,
Serial No. 88

1 Mauser Rifle, 8mm caliber,
No Serial No. listed

1 French Rifle, 8mm caliber
Serial No. 65015

1 Colt Rifle, 223 caliber,
Serial No. SP01072

1 German Rifle, 7.9mm caliber,
Serial No. 2467

1 Swedish Rifle, 8mm caliber,
Serial No. 63428

1 U.S. Military Rifle, 30 caliber,
Serial No. 3541234

1 Belgian Rifle, 8mm caliber,
Serial No. 4599

1 German Rifle, 8mm caliber,
Serial No. 3472

1 Remington Rifle, 30 caliber,
Serial No. 87654

1 Austrian Rifle, 7mm caliber,
Serial No. 4429

1 Czech. Rifle, 8mm caliber,
Serial No. 0402

1 Winchester Rifle, 45-75 caliber,
Serial No. 8222

1 Springfield Rifle, 22 caliber,
Serial No. 11142

1 Winchester Rifle, 30-30 caliber,
Serial No. 1928571

1 Marlin Rifle, 30-30 caliber,
Serial No. G32214

1 Johnson Rifle, 30-06 caliber,
Serial No. B5094

1 Fox Shotgun, 12 gauge caliber,
Serial No. not listed

1 German Rifle, 7.65mm caliber,
Serial No. 6615

1 Russian Rifle, 8mm caliber,
Serial No. AA756

1 Mauser Rifle, 7mm caliber,
Serial No. 4335

1 Italian Rifle, 11mm caliber,
Serial No. V3591

1 Spanish Rifle, 7mm caliber,
Serial No. N9459

1 Japanese Rifle, 7mm caliber,
Serial No. 93247

1 Enfield Rifle, 30mm caliber,
Serial No. 25599

1 Springfield Rifle, 30 caliber,
Serial No. 469203

1 Springfield Rifle, 30 caliber,
Serial No. 3547446

1 French Rifle, 8mm caliber,
Serial No. 8147

1 Winchester Shotgun, 12 gauge,
Serial No. 940906

Lot. No. 5

a) One box of 30 caliber ball ammunition, Class C.

Lot No. 6

a) Four cases of small arms ammunition.

Lot No. 8

a) Four cases of assorted small arms ammunition.

Lot No. 10

a) Two boxes of 45 caliber blank ammunition, 1000 rounds each, blank M-9, Lot RA5000.

Lot No. 13

a) One metal case of 7.5mm ammunition from Soviet Bloc countries.

Lot No. 14

a) Seven boxes of assorted ammunition and gun patches, including one box of 30 caliber, Lot SL-L-37705.

Lot No. 15

a) Two crates of 7.5mm ammunition;

b) Thirty caliber tracers;

c) Eight mm Mauser ammunition, Lot KOP 98-32.

Lot No. 16

a) One gray case containing assorted small arms ammunition.

Lot No. 17

a) Four wood cases of 45 caliber blank ammunition, Lot RA5000

Lot No. 18

a) Two wood cases containing AK-47 ammunition, caliber 7.62mm.

Lot No. 19

a) Two wood crates containing 7.5mm ammunition with New York Inc. marked on side.

Lot. No. 5

a) One box of 30 caliber ball ammunition, Class C.

Lot No. 6

a) Four cases of small arms ammunition.

Lot No. 8

a) Four cases of assorted small arms ammunition.

Lot No. 10

a) Two boxes of 45 caliber blank ammunition, 1000 rounds each, blank M-9, Lot RA5000.

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Lot No. 16

a) One gray case containing assorted small arms ammunition.

Lot No. 17

a) Four wood cases of 45 caliber blank ammunition, Lot RA5000

Lot No. 18

a) Two wood cases containing AK-47 ammunition, caliber 7.62mm.

Lot No. 19

a) Two wood crates containing 7.5mm ammunition with New York Inc. marked on side.

Lot No. 20

a) A cardboard box containing assorted 12 gauge and 14 gauge shotgun shells and revolver ammunition, mostly commercial.

Lot No. 21

a) Two green ammunition cases of 7mm ammunition;

b) Two green ammunition cases of 9mm pistol ammunition;

c) One green case of 30 caliber armor-piercing rifle ammunition (Lot No. S137246).

Lot No. 22

a) One wood crate of 9mm pistol ammunition.

Lot No. 23

a) One ammunition case and two cigar boxes of assorted ammunition.

Lot No. 24

a) One wood case of 9mm pistol ammunition, German make;

b) One crate of 9mm rifle and 45 caliber pistol ammunition made in Germany (Interarmco printed on cases).

Lot No. 25

a) Twenty green cases containing small arms ammunition and blanks.

Lot No. 26

a) Two black metal containers in a wooden case. One container held 7.9mm ball type rifle ammunition. On the side of one container was marked CAT-LO-VOV No. 2721-65, Capt. Dowell (6782), Dec. 4, 1944.

Lot. No. 27

a) Six wood crates of 7.5mm rifle ammunition marked E.F.S. Inc., New York.

Lot No. 28

a) Three wood crates of 30 caliber armor-piercing ammunition (Lot No. 10A-52)

Lot No. 31

a) Two wood crates of 9mm German make pistol ammunition.

Lot No. 32

a) Three green boxes of 45 caliber ammunition and 7.9mm rifle ammunition;

b) Three small boxes of 6.62mm rifle ammunition;

c) Seven Communist Eley 12 gauge shotgun shells.

Lot No. 33

a) One metal box of 7.62mm Chinese ammunition;

b) Three wood crates of small arms ammunition and parts.

Lot No. 34

a) Thirty-eight green ammunition cans containing small arms ammunition;

b) Three wood cases of small arms ammunition;

c) One cartridge casing (no bullet).

Lot No. 36

a) Forty wood crates of small arms ammunition (7.5mm caliber) marked E.F.S. Inc., New York.

Lot No. 38

a) Two wooden crates of shotgun shells (1 marked Ceramics, 1 marked Dinnerware).

Lot No. 39

a) Four wood crates of 7.63mm ammunition;

b) One wood crate of 9mm Mauser ammunition;

c) Twelve green metal boxes of assorted small caliber ammunition.

Lot No. 40

a) Three 155mm H.E. Howitzer shells, M-107, shells marked as follows: 1-R2BDA, 2-R2BAA, 3-R2BLA.

Lot No. 41

a) Four wood crates of assorted shotgun and small arms ammunition;

b) One cardboard box of assorted small arms ammunition;

c) One crate of blanks.

Lot No. 42

a) Six large metal cases of small arms ammunition;

b) Sixteen small metal cases of small arms ammunition;

c) Twelve wooden cases of small arms ammunition;

d) Five cardboard boxes of small arms ammunition.

Lot No. 43

a) Two wooden cases of small arms ammunition.

Lot No. 45

a) Seventeen wooden cases of small arms ammunition;

b) Six metal cases of small arms ammunition;

c) One suitcase (initialed D.E.F.) containing blanks.

Lot No. 46

a) Eight metal boxes of small arms ammunition;

b) Ten wooden boxes of small arms ammunition;

c) One 155mm Howitzer shell (inert).

Lot No. 47

a) Twenty wooden cases of small arms ammunition and magazines.

Lot No. 48

a) Two 37mm shells;

b) One 40mm shell.

Lot No. 49

a) One wooden box of small arms ammunition;

b) One mortar carriage.

Category 9 - pyrotechnics and fireworks:

Lot No. 2

a) One box of assorted firecrackers.

Lot No. 7

a) One metal container holding one M-22-A2 smoke grenade, OPA*7-12;

b) Forty-nine 37mm aerial flares.

Lot No. 25

a) Foreign and domestic color flares.

Lot No. 46

a) One metal box containing pyrotechnics.

Category 10 - weapon parts (including parts for machine guns and automatic pistols, as well as parts for regular rifles and pistols):

Item 44

a) One Carbine barrel and action.

Item 193

a) A Colt conversion kit for 45 automatic pistol.

Lot No. 33

a) One cardboard box of small arms stocks;

b) Parts of three wooden crates containing small arm parts.

Lot No. 43

a) One cardboard box of assorted rifle parts.

Lot No. 45

a) One cardboard box of pistol holsters;

b) Empty magazines. These were included in crates containing other items.

Lot No. 46

a) One wooden rifle stock.

Lot No. 47

a) One cardboard box of rifle parts;

b) One metal box of gun parts.

Lot No. 49

a) Eight wooden boxes of rifle parts and magazines.

Category 11 - ammunition clips and magazines for both regular and automatic weapons:

Lot No. 28

a) Six wood crates of 30 caliber ammunition in 10-round clips (Lot No. LC-13435).

Lot No. 32

a) Six small boxes of clips of 6.5mm ammunition.

Lot No. 45

a) Included in two cardboard boxes - various empty magazines.

Lot No. 46

a) One metal magazine;

b) One metal gun carriage.

Lot No. 47

a) One metal box of magazines.

RECAPITULATION OF AMMUNITION BY CALIBER

.22 caliber blanks	118
.22 caliber BB caps	144
.22 caliber short rifle	463
.22 caliber long rifle	8,706
.22 caliber Hornet	100
.220 caliber	80
.223 caliber	990
.25 automatic	974
.25/35 caliber	40
.257 caliber	20
.300 Savage	588
.30/06 caliber	5,839
.303 British	10,159
.30 caliber	14,050
.30 Luger	7,490
.30 Mauser	5,421
.32 revolver (Italian)	20
.32 automatic	1,425
.32/20 caliber	94
.380 caliber	1,689
.38 S & W (short)	134
.38 S & W (long)	50
.38 caliber special	6,948
.38 automatic	2,272

5.56mm	664
6.35 Carcano	899
6.5 Japanise	200
6.5 Dutch	362
6.5 Carcano	294
6.65 Japanise	260
7mm French	11,608
7mm Mauser	6,840
7.5mm Lebel	200
7.5mm French	95,349
7.5mm Nagant	450
7.57mm Mauser Rifle	140
7.62mm Russian Rifle	9,944
7.62mm Russian Pistol	2,025
7.62mm FN Pistol	450
7.62mm NATO Rifle	6,005
7.62mm Chinese Communist Rifle	1,152
7.62mm Kurz	3,543
7.62 Czech	1,990
7.62mm French	360
7.62X39 Russian	139
7.62X52 Czech	1,200
7.63mm Mauser Pistol	6,285
7.65mm Russian Rifle	726
7.65mm French Pistol	5,363
7.65mm Belgium Rifle	2,010

7.7mm Japanise	320
7.92mm Kurz	109
7.92mm Mauser	190
8X57 Mauser	55
8mm Mauser Pistol	4,310
8mm Lebel	93
8mm Kurz	580
8mm Mauser Rifle	30,412
8mm French Pistol	843
9mm Styer	5,840
9mm Star	8,025
9mm Parabelum	6,000
9mm Luger	34,848
9mm Largo	12,242
9mm Italian	1,079
9mm Mauser	1,987
9mm Bergman	3,445
9.3X62 Rifle Ammunition	1,154
.43 caliber Mauser Pistol	105
.45 caliber automatic	6,764
.45 caliber blanks	17,078
.45 caliber Colt	1,512
.45/70 ammunition	900
.45/75 ammunition	29
.50 caliber maching gun links	1,400
.445 Russian	90
.455 British	150

10.75mm Mauser	899
11mm Black Powder	199
20mm Cannon	1
Gyro Jets	30
12 gauge shotgun	3,058
.410 shotgun shells	268
.43 caliber Spanish Rifle	39
TOTAL	370,326 Live Rounds

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE E. FASSNACHT, PETITIONER	:	OCTOBER TERM, 1978
V.	:	
COMMONWEALTH OF PENNSYLVANIA, RESPONDENT	:	NO. 78-191

CERTIFICATION OF SERVICE

I, JANE CUTLER GREENSPAN, ESQUIRE, COUNSEL FOR RESPONDENT, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED A COPY OF THIS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA TO BE SERVED UPON GREGORY M. HARVEY, ESQUIRE, COUNSEL FOR PETITIONER, GEORGE E. FASSNACHT, BY DEPOSITING FIVE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO GREGORY M. HARVEY, ESQUIRE, 2200 THE FIDELITY BUILDING, 123 SOUTH BROAD STREET, PHILADELPHIA, PENNSYLVANIA, 19109, ON SEPTEMBER 22, 1978.

JANE CUTLER GREENSPAN

Supreme Court, U. S.
FILED
AUG 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-191

GEORGE E. FASSNACHT
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

On Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF OF AN AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA

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CONSIDERATION FOR THE BRIEF OF AN AMICUS CURIAE

The National Rifle Association of America respectfully files with this Court a brief, amicus curiae, in support of the petitioner in the instant case. This filing is made pursuant to Rule 42 of the Supreme Court Rules. Both counsel for the petitioner and the respondent have consented to this filing and a letter from each has been filed with the Clerk of this Court. The interest of the amicus curiae and our reasons for filing are set forth below.

INTEREST OF THE AMICUS CURIAE

The National Rifle Association of America is a national non-profit sportsmen's organization incorporated under the laws of the State of New York. As stated in its bylaws, among the purposes and objectives of the National Rifle Association of America are:

> "1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
>
> 2. To promote public safety, law and order, and the national defense".

In the furtherance of these objectives, the National Rifle Association of America seeks to represent in all forums and courts nationwide, the concern of the citizenry with the issues affecting the foregoing rights regarding ownership and use of firearms.

This case, involving as it does both questions of statutory construction and the law of forfeitures, will have a major impact on gun collectors, owners and hobbyists throughout the nation.

Accordingly, amicus respectfully considers it important for this Court to exercise its discretionary authority and grant the petitioner's request for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

IN THE

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OCTOBER TERM, 1978

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On Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF OF AN AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA

ARGUMENT

I. THE SUPERIOR COURT OF PENNSYLVANIA ERRONEOUSLY CONCLUDED THAT PETITIONER WAS AN UNLICENSED DEALER IN VIOLATION OF THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 921(a)(11).

Amicus will not reiterate the legal arguments made by the petitioner in the instant case, although we agree with them and wish to associate ourselves with them and petitioner's statement of the case. We will confine our argument to the pragmatic issues relating to the Gun

Control Act of 1968, Public Law 90-618, 18 U.S.C. § 921 *et seq.*; its purposes and standards; and, in particular, what acts, deeds or conduct will subject a firearms collector and owner to be classified as a "dealer" of firearms, pursuant to the applicable licensing requirements of 18 U.S.C. § 921 *et seq.*

The instant case, while a civil forfeiture as opposed to a criminal proceeding, is yet another in a line of cases in which the courts have been called upon to review the statutory construction of the Gun Control Act of 1968. As to this case, the applicable sections are:

> 18 U.S.C. § 921: *Definitions*
>
> a. As used in this Chapter:
>
> (11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this Chapter.
>
> 18 U.S.C. § 922: *Unlawful Acts*
>
> a. It shall be unlawful—
>
> (1) For any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce,

The operative words are "engaged in the business of selling . . . repairing . . . or pawn[ing]" firearms and ammunition. Numerous U.S. Circuit Courts of Appeal have been called upon to interpret this phrase.

But while the instant case is merely another in the line of cases demanding construction of 18 U.S.C. § 921 (a) (11), it differs from *all* the others in that here, there is no evidence of a sale, or an allegation of a sale, or attempted sale of firearms by the petitioner. In each and every one of the other cases the defendant had been found to be an "unlicensed dealer" because of, or in addition to, sales of firearms.

The standard for defining a dealer was first enunciated in *United States* v. *Gross*, 451 F.2d 1355, 1357 (7th Cir. 1971), in which the court held that " 'business' requires time, attention, and labor for the purpose of livelihood or profit". *Accord, United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973); *United States* v. *King*, 532 F.2d 505 (5th Cir. 1976); *United States* v. *Williams*, 502 F.2d 581 (8th Cir. 1974); *United States* v. *Wilkening*, 485 F.2d 234 (8th Cir. 1975); *United States* v. *Powell*, 513 F.2d 1249 (8th Cir. 1975); *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975). *United States* v. *Jackson*, 325 F. Supp. 672, 674 (S.D. Ohio 1972), *aff'd*, 480 F.2d 927, more strictly defined this standard by holding that "anyone is engaged in the business of dealing in firearms if they have guns on hand . . . with the *purpose* of selling some or all . . ." [emphasis added]. In *United States* v. *Williams*, 502 F.2d 581, 583 (8th Cir. 1974), the court said flatly: " 'engaging in business' [means that] . . . there could be no doubt in the minds of men of common intelligence that 'dealer' means one that is engaged in any business of *selling* firearms . . ." [emphasis added]. *Accord, United States* v. *Baker*, 397 F. Supp. 1122 (E.D. Mo. 1975). Therefore, "engaged in the business" has been interpreted to mean "engaged in the business of selling". Clearly the petitioner, as evidenced by the record herein, did not sell firearms. His conduct could not rationally be construed as promoting an activity whose *purpose* was the sale of firearms or ammunition.

If there is no evidence that a collector or owner of firearms has engaged in sales of firearms, then based on the *Gross* and *Williams* cases, to determine that one is a dealer becomes most difficult, if not totally arbitrary. Statutory construction of the term "engaged in the business" becomes far more difficult. Without the element of a sale or profit from the sale of firearms, what then is the Government's standard? We think there is no adequate standard without these crucial elements and that the term "dealer" in this context has little meaning without them. However, in a leading case on this point, *United States* v. *Huffman*, 518 F.2d 80, 81 (4th Cir. 1975), the court stated: "Thus while the Government need not prove an actual profit from sales of firearms, *it must show a willingness to deal*, a profit motive, and a greater degree of activity than occasional sales by a hobbyist" [emphasis added]. We believe this to be a sound approach; and we submit that it is in the context of just such a realistic approach that petitioner's case should be judged. Therefore, accepting the minimum standard thus far judicially propounded, the Government must show a "willingness to deal" and some profit motive by a preponderance of the evidence. The record of the instant case demonstrates that the Superior Court of the State of Pennsylvania concluded the petitioner was an "unlicensed dealer" based solely on the testimony of one Bureau of Alcohol, Tobacco, and Firearms agent. The testimony of the agent included personal comments and conclusions completely unsubstantiated in fact or practice, to the effect that the quantity and packaging of the seized firearms were consistent with dealership. To arbitrarily apply the term "unlicensed dealer" based on personal observations of, for example, the quantity of firearms possessed or the "nature, quality, and manner of storage" of such firearms is contrary to aforementioned case law and inconsistent with, and contrary to

the intent of the drafters of the Gun Control Act of 1968 (P.L. 90-618).

To determine the meaning and intent of the Gun Control Act of 1968 we need look no further than the law itself. Section 101 of Public Law 90-618 provides that:

> "The Congress hereby declares that the purpose of this title [which amended 18 U.S.C. § 921] is to provide support to Federal, State and local law enforcement officials in their fight against crime and violence, and it is *not* the purpose of this title to place any undue or unnecessary restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is *not* intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those *reasonably* necessary to implement and effectuate the provisions of this title" [emphasis added].

To subjectively apply an "unlawful act" label on conduct which, by itself, is lawful (i.e. the collection of firearms) is both self-defeating of the stated purposes of the law and self-serving of the limited aims of the government here, which was to insure forfeiture of firearms, following an illegal seizure of said firearms by the Philadelphia police. Plainly, this law was not intended to be subverted so that a "collector" could be arbitrarily determined a "dealer". The ramifications of the lower court's holding in the instant case is certain to achieve exactly the opposite of the law's purpose: a discouragement of the private possession of firearms.

The forfeiture of petitioner's property could be accomplished only by a finding that the property was con-

traband per se and that a return of the seized items to petitioner would "enable him to resume deealing in them". Generally forfeitures are not favored and "should be enforced only when they are within both the letter and the spirit of the law." *Epps* v. *Bureau of Alcohol, Tobacco and Firearms*, 375 F. Supp. 345, 348 (E.D. Tenn. 1972), *aff'd*, 495 F.2d 1373 (6th Cir. 1973). In *United States* v. *1922 Assorted Firearms*, 330 F. Supp. 635 (E.D. Mo. 1971), the court held that without a showing of a wrongful intent to violate either the law or any regulations, the forfeiture of one's entire stock of firearms and ammunition is unwarranted. With a showing of wrongful intent, only those items directly related to the unlawful act would be subject to forfeiture. Here the petitioner never violated, or intended to violate, the law or regulations. The decision of the Superior Court in relying on the licensed dealer requirements to support the forfeiture was incongruous at best.

In involved and complex matters of interpretation and statutory construction a certain degree of flexibility is necessary. Care should be taken to strike a fine balance between the rights of society in general and the rights of the individual in particular. In such cases as this, involving forfeiture only, in which the good faith of the owner was actually demonstrated, and no unlawful conduct shown, a strict approach with emphasis on individual rights, rather than a balancing test, should be applied.

This case contains four crucial elements: (1) admitted denial of the petitioner's Fourth Amendment rights in the search and seizure of his personal property; (2) a resulting suppression of the evidence of the search and seizure; (3) the attachment of an "unlawful act" to an act which, by itself, is wholly lawful; and (4) a resulting forfeiture of petitioner's valuable personal property.

We urge the Court to review the decision of the Superior Court of Pennsylvania because its decision to uphold the forfeitures by engaging in, and utilizing, an artificial standard for defining a dealer is contrary to the intent of the Gun Control Act of 1968, and contrary to the foregoing cited federal decisions. This decision establishes a harmful precedent which cannot be allowed to stand. The harm is the potential use of this precedent by state and/or federal investigative agencies to institute excessive civil forfeitures and criminal proceedings against lawful firearms owners and collectors.

CONCLUSION

The facts and law regarding this case demonstrate that the petitioner has been denied his property based on a decision that is contrary to established federal law. Based on the foregoing, we respectfully urge this Court to grant petitioner's request for a writ of certiorari.

Respectfully submitted,

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